Supreme Court, U.S.
FILED

94 794 NOV 1 1994

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1994

LEON GARMON,

Petitioner,

versus

THE ALABAMA STATE BAR,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Alabama

PETITION FOR WRIT OF CERTIORARI

JULIAN MCPHILLIPS
516 South Perry Street
Montgomery, Alabama 36104
(205) 262-1911

Attorney at Law

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

115pw

QUESTIONS PRESENTED

I.

WHETHER SUBJECTING A LAWYER TO STATE BAR DISCIPLINARY CHARGES FOR MAKING ALLEGATIONS OF BIAS, PREJUDICE OR IMPROPRIETY AGAINST A JUDGE IN A RECUSAL MOTION, FILED ON BEHALF OF HIS CLIENT, WHICH ALLEGATIONS WERE MADE IN GOOD FAITH BY THE LAWYER AND WERE JUDICIALLY FOUND NOT TO BE FALSE, CONSTITUTES AN IMPERMISSIBLE INFRINGEMENT OF THE LAWYER'S FIRST AMENDMENT RIGHT OF FREE SPEECH.

II.

WHETHER, IN QUASI-CRIMINAL STATE BAR DISCIPLINARY PROCEEDINGS IN WHICH AN ACCUSED LAWYER HAS MOST, IF NOT ALL, THE SUBSTANTIVE RIGHTS OF A CRIMINAL DEFENDANT, THE USE OF THE PRE-TRIAL DISCOVERY DEPOSITION OF PETITIONER'S ACCUSER, WHO DIED PRIOR TO THE *ORE TENUS* HEARING BEFORE THE DISCIPLINARY AUTHORITY, AS THE SOLE EVIDENCE IN SUPPORT OF THE CHARGES AGAINST PETITIONER, EFFECTIVELY PREVENTED PETITIONER FROM CONFRONTING HIS ACCUSER AT TRIAL IN VIOLATION OF THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT.

QUESTIONS PRESENTED – Continued

III.

WHETHER THE FINDINGS OF GUILTY IN ASB-90-632, DEALING WITH MR. GARMON'S LETTER TO THE FANCHIERS, VIOLATE MR. GARMON'S FIRST AMENDMENT RIGHT TO COMMUNICATE TRUE INFORMATION TO PERSONS HE REASONABLY BELIEVES TO BE HIS CLIENTS IN DEFENSE OF FRIVOLOUS CHARGES OF LEGAL MALPRACTICE, AND FURTHER VIOLATE HIS SIXTH AMENDMENT RIGHT TO CONFRONT AND CROSS-EXAMINE HIS ACCUSER.

IV.

WHETHER THE PUNISHMENT IMPOSED BY THE DISCIPLINARY BOARD OF THE ALABAMA STATE BAR IN THESE CASES IS EXCESSIVE AND DISPROPORTIONATE TO THE OFFENSES COMMITTED AND IS CONTRARY TO MR. GARMON'S DUE PROCESS AND EQUAL PROTECTION RIGHTS AS WELL AS HIS RIGHT TO BE PROTECTED AGAINST CRUEL AND UNUSUAL PUNISHMENT.

LIST OF PARTIES

All parties to this case are listed in the caption. The Alabama State Bar is a creation of the Legislature of Alabama, ***Ala. Code*** [sec.] 34-3-40,[1] *et seq.* (creating the Board of Commissioners of the Alabama State Bar), and its actions in this case are taken by and under the authority and law of the State of Alabama. ***Ala. Code*** [secs.] 34-3-80, 34-3-81. Thus, 28 U.S.C. [sec.] 2403(b) may be involved and the Attorney General of Alabama, while not a party to this case, has been served with this petition as required by Rule 29.4(c) of the Rules of this Court.

---

[1] Unless otherwise noted, citations to the statutory law of Alabama are to the ***Code of Alabama (1975)***, as amended, adopted as the official codification of the acts of the Alabama Legislature on February 17, 1977, by Act No. 20, Alabama Acts, Regular Session 1977.

TABLE OF CONTENTS

Page

Questions Presented i

List of Parties iii

Table of Authorities vii

Decisions Below 1

Jurisdiction 2

Constitutional, Statutory and Regulatory Provisions Involved 3

Statement of the Case 3

I. Proceedings Below in ASB-90-775 and ASB-90-632 5

II. Judge Swann's Bar Complaint in ASB-90-775 Regarding Mr. Garmon's Motions for Recusal 9

A. Motions for Judge Swann's Recusal 9

III. Proceedings Below in ASB-90-527, A Companion Disciplinary Proceeding Against Mr. Garmon .. 11

IV. Judge Swann's Deposition, His Death, and The State Bar's Use of That Deposition as Evidence Against Mr. Garmon 12

V. Mr. Robertson's Complaint In ASB-90-632 regarding Mr. Garmon's letter to the Fanchiers... 13

Summary of Argument 14

Argument 17

TABLE OF CONTENTS – Continued

Page

I. SUBJECTING A LAWYER, MR. GARMON IN THIS CASE, TO BAR DISCIPLINARY CHARGES FOR MAKING ALLEGATIONS OF BIAS, PREJUDICE OR IMPROPRIETY AGAINST A JUDGE IN A RECUSAL MOTION, WHICH ALLEGATIONS WERE MADE IN GOOD FAITH BY THE LAWYER AND WERE JUDICIALLY FOUND NOT TO BE FALSE, FILED ON BEHALF OF HIS CLIENT, CONSTITUTES AN UNWARRANTED AND IMPERMISSIBLE INFRINGEMENT OF THE LAWYER'S FIRST AMENDMENT RIGHT OF FREE SPEECH, AND PERMITTING SUCH IMPROPER PROSECUTION OF LAWYERS WILL HAVE A CHILLING EFFECT ON ALL LAWYERS, CAUSING THEM TO INTENTIONALLY FAIL TO MAKE RECUSAL MOTIONS IN CASES IN WHICH THOSE MOTIONS ARE NECESSARY TO PRESERVE THE RIGHTS OF THEIR CLIENTS FOR FEAR OF PROSECUTION AND DISCIPLINE BY THE BAR 17

A. FACTUAL CONTEXT OF THIS PETITION .. 18

B. LEGAL CONTEXT OF THIS PETITION 20

C. SOUND CONSTITUTIONAL REASONING REQUIRES A FEDERAL RULE THAT, ABSENT A FINDING THAT ALLEGATIONS OF IMPROPRIETY ON THE PART OF A PARTICULAR JUDGE WERE MADE BY A LAWYER WHO KNEW THE ALLEGATIONS WERE FALSE OR IN RECKLESS DISREGARD OF THEIR TRUTH OR FALSITY, THE SUBJECT LAWYER IS NOT TO BE DISCIPLINED FOR MAKING SUCH ALLEGATIONS OF IMPROPRIETY UNLESS THE MAKING OF THOSE ALLEGATIONS OBSTRUCTS, DISRUPTS, HINDERS OR IMPEDES THE ADMINISTRATION OF JUSTICE..... 21

TABLE OF CONTENTS – Continued

Page

II. SINCE, IN QUASI-CRIMINAL STATE BAR DISCIPLINARY PROCEEDINGS, AN ACCUSED LAWYER HAS MOST, IF NOT ALL, THE SUBSTANTIVE RIGHTS OF A CRIMINAL DEFENDANT, THE USE OF THE PRE-TRIAL DISCOVERY DEPOSITION OF MR. GARMON'S ACCUSER, WHO DIED PRIOR TO THE *ORE TENUS* HEARING BEFORE THE DISCIPLINARY AUTHORITY, AS THE SOLE EVIDENCE IN SUPPORT OF THE CHARGES AGAINST MR. GARMON, EFFECTIVELY PREVENTED MR. GARMON FROM CONFRONTING HIS ACCUSER AT TRIAL, AND VIOLATES THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT.. 25

III. THE FINDINGS OF GUILTY IN ASB-90-632, DEALING WITH MR. GARMON'S LETTER TO THE FANCHIERS, VIOLATE MR. GARMON'S FIRST AMENDMENT RIGHT TO COMMUNICATE TRUE INFORMATION TO PERSONS HE REASONABLY BELIEVES TO BE HIS CLIENTS IN DEFENSE OF FRIVOLOUS CHARGES OF LEGAL MALPRACTICE, AND FURTHER VIOLATE HIS SIXTH AMENDMENT RIGHT TO CONFRONT AND CROSS-EXAMINE HIS ACCUSER..... 26

IV. THE PUNISHMENT IMPOSED BY THE DISCIPLINARY BOARD OF THE ALABAMA STATE BAR IN THESE CASES IS EXCESSIVE AND DISPROPORTIONATE TO THE OFFENSES COMMITTED AND IS CONTRARY TO MR. GARMON'S DUE PROCESS AND EQUAL PROTECTION RIGHTS AS WELL AS HIS RIGHT TO BE PROTECTED AGAINST CRUEL AND UNUSUAL PUNISHMENT 27

Conclusion 29

Appendix.....A-1

TABLE OF AUTHORITIES

Page

CASES

California v. Green, 399 U.S. 149 (1970) 8, 26

Chisom v. Roemer, 501 U.S. ___ (1991) 11

Coy v. Iowa, 487 U.S. 1012 (1988) 8

Ex parte Garmon [Ms. 1900644, June 14, 1991], ___ So.2d ___ (Ala. 1991) 12

Garrison v. Louisiana, 379 U.S. 64 (1964) 16, 21, 26

Houston Lawyers' Association v. Texas Attorney General, 501 U.S. ___ 379 (1991) 11

Huckaby v. Alabama State Bar, 631 So.2d 855 (Ala. 1993) 27

In re Johnson, 240 Kan. 334, 729 P.2d 1175 (1986) 20

Louisiana State Bar Association v. Karst, 428 So.2d 406 (La. 1983) 22

Nebraska State Bar Association v. Michaelis, 210 Neb. 545, 316 N.W.2d 46 (1982) 20

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 16, 21, 26

Polk v. State Bar of Texas, 374 F.Supp. 784 (N.D. Tex. 1974) 15, 22

Potashnick v. Port City Construction Co., 609 F.2d 101 (5th Cir. 1980) 24

Re Sawyer, 360 U.S. 622 (1959) 15, 22

Thatcher v. United States, 212 F. 801 (6th Cir. 1914) 20

United States v. Alabama, 828 F.2d 1532 (11th Cir. 1987), *cert. denied sub nom. Board of Trustees of Alabama State University v. Auburn University*, 487 U.S. 1210 (1988) 24

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

United States Constitution

Amend. I ..... *passim*

Amend. V 3, 7, 9, 27, 29

Amend. VI ..... *passim*

Amend. VIII 3, 9, 27, 29

Amend. XIV ..... *passim*

STATUTES

Judiciary Act of 1789

Section 25, 1 Stat. 73 2

United States Code

Title 28, Section 1257(3) 2

Title 42, Section 1973 10

RULES

Rules of the Supreme Court of the United States
Rule 10.1(c) 18

Code of Professional Responsibility of the Alabama State Bar Generally 3

Canon 1

Disciplinary Rule DR-1-102(A)(4) 3, 5

Disciplinary Rule DR-1-102(A)(5) 3, 5, 18

Disciplinary Rule DR-1-102(A)(6) 3, 5, 14, 18

TABLE OF AUTHORITIES – Continued

Page

Canon 7

Disciplinary Rule DR-7-101(A)(1) 3

Disciplinary Rule DR-7-104(A)(1) 14

Disciplinary Rule DR-7-106(B)(2) 3, 5, 16

Canon 8

Disciplinary Rule 8-101(A) 15

Disciplinary Rule 8-101(B) 3, 18

Alabama Rules of Appellate Procedure (Ala.R.App.P.)

Rule 20 8

Alabama Rules of Civil Procedure (Ala.R.Civ.P.)

Rule 32(a)(3)(A) 13

Rule 50 7

Rule 59 7

Alabama Rules of Disciplinary Procedure (Ala.R.Disc.P.)

Rule 3(b) 7

Rule 8(b) 6

Rule 12(e)(1) 22

Rule 19(a) 22

Alabama Standards for Imposing Lawyer Discipline

Standard 1.3(3) 29

TABLE OF AUTHORITIES – Continued

Page

Federal Rules of Civil Procedure (Fed.R.Civ.P.)

Rule 50 7

Rule 59 7

TREATISES, ANNOTATIONS & OTHER AUTHORITIES

W.M. Acker, Jr., "Why Judge Resigned from ABA," *National Law Journal*, Jan. 25, 1993, at 17 ..... 24, 25

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

DECISIONS BELOW

The decision of the Supreme Court of Alabama affirming the findings of guilty and punishment imposed upon Leon Garmon by the Disciplinary Board of the Alabama State Bar in ASB-90-775 and ASB-90-632, entered by order and without opinion, dated April 29, 1994, has not been published in the official reporter of that court but is reproduced in the appendix to this petition. (App. A-1). The decision of the Supreme Court of Alabama overruling, without comment or opinion, petitioner's application for rehearing in ASB-90-775 and ASB-90-632, dated June 17, 1994, has not been published but is also reproduced in the appendix to this petition. (App. C-1). The order of the Disciplinary Board of the Alabama State Bar promulgating the findings of guilty in ASB-90-775 and imposing a 45-day suspension from the practice of law against petitioner as discipline on those findings of guilty, dated October 30, 1992, has not been published but is reproduced in the appendix to this petition. (App. B-1). The Disciplinary Board's order promulgating the findings of guilty in ASB-90-632 and imposing discipline thereon, dated October 30, 1992, has not been published but is included in the appendix to this petition. (App. B-3). The Disciplinary Board's orders of December 15, 1992, denying Mr. Garmon's post-judgment motions challenging the findings of guilty in ASB-90-775 and ASB-90-632 are included in the appendix. (App. B-5, B-7, respectively). The denial of Mr. Garmon's post-judgment motions challenging the findings of guilty and the order of discipline formed the basis of petitioner's

appeal to the Alabama Supreme Court and this petition for certiorari.

JURISDICTION

The appellate jurisdiction of this Court under 28 U.S.C. [Sec.] 1257(3) is invoked in this case. The Alabama Supreme Court's decision (App. A-1) and June 17, 1994, order overruling petitioner's application for rehearing (App. C-1) necessarily denied petitioner's First, Sixth and Fourteenth Amendment challenges to the findings of guilty in the underlying attorney disciplinary proceedings. The question of whether the findings of guilty in the instant attorney disciplinary proceedings amount to an impermissible infringement and violation of petitioner's federal constitutional rights under the First, Sixth and Fourteenth Amendments was presented to both the Disciplinary Board of the Alabama State Bar and the Supreme Court of Alabama, and the decisions of the Supreme Court of Alabama on that question are properly reviewable by this Court on certiorari.

Section 25 of the Judiciary Act of 1789 granted this Court jurisdiction over and the power to review any "final judgment or decree in any suit" rendered by the highest court of any state in which the suit could be brought. 1 Stat. 73, 75. The present version of section 25 applicable to this case, 28 U.S.C. [sec.] 1257(3), grants the Court jurisdiction to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had by writ of certiorari . . . where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed

under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The involved provisions of the United States Constitution and the Code of Professional Responsibility of the Alabama State Bar including the First, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; Disciplinary Rule DR-1-102(A)(4), DR-1-102(A)(5), DR-1-102(A)(6) under Canon 1 of the Code of Professional Responsibility of the Alabama State Bar; Disciplinary Rule DR-7-104(A)(1), DR-7-106(B)(2) under Canon 7 of the Code of Professional Responsibility of the Alabama State Bar; and Disciplinary Rule 8-101(B) under Canon 8 of the Code of Professional Responsibility of the Alabama State Bar.

STATEMENT OF THE CASE

This is an attorney disciplinary case. Petitioner Leon Garmon is an attorney at law who practices in Gadsden, Alabama. Mr. Garmon is a graduate of Glencoe High School. During high school, Mr. Garmon was president of his sophomore and senior classes and he was a delegate to Alabama Boys' State. After graduation, Mr. Garmon attended Howard College. Mr. Garmon was awarded football grants-in-aid from both Howard College and Jacksonville State University.

Upon graduating from college, Mr. Garmon was commissioned as a Combat Engineer second lieutenant in the United States Army through Officer Candidate School (OCS) at Fort Belvoir, Virginia. Mr. Garmon is also airborne-qualified, and is a qualified Army Ranger. Mr.

Garmon has been certified and qualified as a member of the United States Army Special Forces (the "Green Berets"). After assignment to the 197th Infantry Brigade at Fort Benning, Georgia, Mr. Garmon was assigned to and completed one tour of duty with the 173rd Airborne Brigade in the Republic of Vietnam. After serving with various United States Army Reserve and Alabama National Guard units and commands, Mr. Garmon attained the rank of major while serving with the 87th Maneuver Area Command (MAC) of the United States Army Reserve in Birmingham.

After he returned from Vietnam and was discharged from active military duty, Mr. Garmon applied for and was accepted to Cumberland School of Law from which he graduated in 1974.[1] Mr. Garmon passed the Alabama State Bar examination on his first attempt and was admitted to practice in Alabama on November 21, 1974.

Mr. Garmon is a member of the Bar of this Court, the United States Courts of Appeal for the Fifth and Eleventh Circuits, the United States District Court for the Northern District of Alabama, and the Supreme Court of Alabama. Mr. Garmon's license to practice law in any court has never been suspended, revoked or cancelled.

Mr. Garmon has been engaged in the private practice of law continuously since 1976. In the past ten years, he has represented 400-500 clients per year in cases ranging from criminal and domestic matters, to legal and medical malpractice cases, civil rights and Voting Rights cases, and other types of civil litigation. Mr. Garmon has been

---

[1] Mr. Garmon had been admitted to both the Alabama School of Law and Cumberland prior to his military service and he reapplied under the provisions of the Soldiers' and Sailors' Civil Relief Act.

an attorney of record in more than 50 appeals to the appellate courts of Alabama, and the federal appeals courts.

Mr. Garmon has been married to the former Harriet Bolton of Birmingham for over 24 years. Mr. and Mrs. Garmon are the parents of four children, Cam (16 years old), Trent (14 years), and twins Wesley and Leslie (11 years). Cam is mentally retarded and will require lifelong assistance in the activities of daily living.

Mr. Garmon is a member of the First Baptist Church of Gadsden. He is an ordained deacon and Sunday School teacher. Mr. Garmon has been active in the Gadsden Kiwanis Club, the March of Dimes, the Gadsden Quarterback Club and other civic groups.

Mr. Garmon's family's sole income is from his practice of law. Harriet Garmon is employed as his office manager. The family has no other source of income.

I. PROCEEDINGS BELOW IN ASB-90-775 AND ASB-90-632

On October 2, 1992, in case number ASB-90-775, Mr. Garmon was found guilty by the Disciplinary Board of the Alabama State Bar, which is a state agency created by the Alabama Legislature and functioning as a mandatory integrated bar association, of violating Disciplinary Rules DR-1-102(A)(4), DR-1-102(A)(5), DR-1-102(A)(6) and DR-7-106(B)(2) of the Code of Professional Responsibility of the Alabama State Bar. (App. B-1).

The complaint of the Alabama State Bar ("the Bar") against Mr. Garmon in ASB-90-775, was based upon a grievance filed by the late Etowah County Circuit Court

Judge Julius S. Swann, Jr., on September 21, 1990.[2] Common to all five charges brought against Mr. Garmon in the complaint in ASB-90-775, was the Bar's allegation that Mr. Garmon filed written motions to recuse against Judge Swann in four domestic relations cases pending before Judge Swann in which Mr. Garmon appeared as counsel.

On October 30, 1992, judgment was entered by the Disciplinary Board on its findings of guilty as to Charge I, Charge II, Charge III and Charge IV, and on its finding of not guilty as to Charge V in ASB-90-775. (App. B-1). After hearing evidence in aggravation and mitigation of the discipline to be imposed on its findings of guilty, the Disciplinary Board fixed Mr. Garmon's punishment at a 45-day suspension from the practice of law in Alabama.[3] (App. B-1).

On June 19, 1992, the Alabama State Bar filed formal disciplinary charges against Mr. Garmon in ASB-90-632. Those charges, brought on the basis of a grievance filed by Gadsden attorney Kenneth P. Robertson, Jr., who was formerly employed as an unlicensed law clerk by Mr. Garmon, alleged that Mr. Garmon had contacted three of Mr. Robertson's clients, Billy Fanchier, Joyce Fanchier and Joyce Marie Fanchier ("the Fanchiers"), who were clients of Mr. Garmon, after learning that those clients were represented by Mr. Robertson. The Bar's complaint specifically alleged that Mr. Garmon sent the Fanchiers a copy of a letter addressed to Mr. Robertson, and that letter

---

[2] Judge Swann died on September 4, 1992, of an apparent heart attack at the age of 52.

[3] The Disciplinary Board originally imposed a 30-day suspension for punishment but, after being told by the General Counsel of the Bar that the "minimum" suspension allowed under Rule 8(b), Ala.R.Disc.P., the Board modified its imposition of discipline to the 45-day suspension.

contained language, material and statements about Mr. Robertson that were demeaning and insulting.

On October 30, 1992, judgment was entered by the Disciplinary Board on its findings of guilty as to Charge I, Charge II, Charge III and Charge IV, and on its finding of not guilty as to Charge V in ASB-90-775 (App. B-1), and on its findings of guilty as to Charge I and ***not guilty*** as to Charge II in ASB-90-632. (App. B-3).

On November 30, 1992, Mr. Garmon filed a comprehensive, broad-based and detailed post-judgment motion, under Rules 50 and 59, Ala.R.Civ.P.,[4] in ASB-90-775 and ASB-90-632 seeking a new trial or judgment notwithstanding the verdict.[5] That post-judgment motion claimed, *inter alia*, that the findings of guilty and punishment thereon violated Mr. Garmon's federal constitutional rights under the First, Fifth and Fourteenth Amendments. That post-judgment motion sought relief from both the findings of guilty and discipline imposed in both ASB-90-775 and ASB-90-632. Without a hearing, on December 15, 1992, the Disciplinary Board denied Mr. Garmon's post-judgment motion in ASB-90-775. (App. B-5) and ASB-90-632 (App. B-7).

After denial of his post-judgment motion, as permitted by the Alabama Rules of Disciplinary Procedure governing attorney disciplinary proceedings, Mr. Garmon timely appealed directly to the Alabama Supreme Court from the findings of guilty and punishment imposed

---

[4] Nominally at least, the Rules of Civil Procedure apply to attorney disciplinary proceedings. *See* Rule 3(b), Ala.R.Disc.P.

[5] As they are pertinent to this petition, Rules 50 and 59 of the Alabama Rules of Civil Procedure are identical to Rules 50 and 59 of the Federal Rules of Civil Procedure.

against him by the Disciplinary Board in ASB-90-775 and ASB-90-632.

In his principal brief to the Alabama Supreme Court in the appeal in ASB-90-775,[6] dealing with the recusal motions directed to Judge Swann, and his allegedly improper communications with the Fanchiers in ASB-90-632, Mr. Garmon squarely raised a First Amendment free speech challenge to the Disciplinary Board's findings of guilty. The relevant portions of Mr. Garmon's principal brief are contained in the appendix. (App. E-1).

In that direct appeal, Mr. Garmon challenged the findings of guilty in ASB-90-775 on the grounds that use by the Alabama State Bar of Judge Swann's oral deposition as the bulk of its evidence against Mr. Garmon at the final *ore tenus* hearing before the Disciplinary Board, which hearing was conducted after Judge Swann's death, violated Mr. Garmon's Sixth Amendment right to confront his accuser as set out by this Court in *California v. Green*, 399 U.S. 149 (1970), and *Coy v. Iowa*, 487 U.S. 1012 (1988). (App. E-1). Likewise, in ASB-90-632, Mr. Garmon challenged the findings of guilty on Sixth Amendment confrontation clause grounds claiming that the findings are "based upon the unsworn out-of-court statements by Kenneth P. Robertson, Jr., and others, in ***correspondence*** to the Alabama State Bar. Leon Garmon did not have and was not given the opportunity to cross-examine the declarant (Robertson), contrary to Leon Garmon's right of confrontation and fundamental due process." (App. E-1) (emphasis in original).

---

[6] The Alabama Rules of Appellate Procedure (Ala.R.App.P.), which governed this case in the court below, state that "[a]ssignments of error are not required. Statement of the issues presented on appeal in the appellant's brief as required by Rule 28 shall be sufficient." Rule 20, Ala.R.App.P.

On April 29, 1994, the Alabama Supreme Court by *per curiam* order and without opinion affirmed the Disciplinary Board's findings of guilty and punishment imposed against Mr. Garmon by the Alabama State Bar's Disciplinary Board in ASB-90-775 and ASB-90-632. *See Leon Garmon v. Alabama State Bar*, Nos. 1920598, 1920599 (Ala., April 29, 1994) (App. C-1).

Mr. Garmon filed an application for rehearing of the Alabama Supreme Court's no-opinion affirmance on May 12, 1994.

Mr. Garmon insisted in his application for rehearing that the Alabama State Bar's actions in ASB-90-775 violated his Sixth Amendment right of confrontation.

On June 17, 1994, the Alabama Supreme Court overruled without opinion Mr. Garmon's application for rehearing and failed to address Mr. Garmon's federal First and Sixth Amendment challenge to his disciplinary convictions. The Alabama court's order summarily overruling Mr. Garmon's application for rehearing is included in the appendix. (App. C-1). With the denial of his application for rehearing by the Supreme Court of Alabama, Mr. Garmon has exhausted his state remedies for the violations of his federal First, Fifth, Eighth, Sixth and Fourteenth Amendment rights.

II. JUDGE SWANN'S BAR COMPLAINT IN ASB-90-775 REGARDING MR. GARMON'S MOTIONS FOR RECUSAL

A. MOTIONS FOR JUDGE SWANN'S RECUSAL

In his recusal motions, Mr. Garmon summarized Judge Swann's political activities since assuming the circuit court bench, including solicitations of votes and contributions for various county elected officials, including former Glencoe Mayor Ronnie O. Rampey. The recusal

motions alleged that Judge Swann, who was the trial judge for Mr. Rampey's ***first*** criminal trial, improperly allowed his political considerations influence his judicial decision to dismiss the criminal charges against Mr. Rampey.[7]

Further, Mr. Garmon alleged that Judge Swann's business and political activities and associations led him to grant summary judgment to Gregerson's Warehouse Groceries, owned by Peter V. Gregerson, in a malicious prosecution and false arrest lawsuit filed by Mr. Garmon on behalf of a client. *Viola Franklin v. Gregerson's Foods, Inc., et al.*, CV-87-348-JSS, Circuit Court of Etowah County, Alabama. Peter V. Gregerson, the principal owner of Gregerson's Foods, Inc., was a substantial political supporter of Judge Swann.[8]

Judge Swann was accused of currying the favor of the dean of Etowah County's state legislative delegation, Joe Mack Ford, by ruling in Mr. Ford's divorce case, from his wife of some 20 years, in a way that was favorable to Mr. Ford. Judge Swann denied a motion for his recusal, filed by Gadsden attorney Jack W. Torbert on behalf of Mrs. Ford, in Mr. Ford's divorce case.

In addition to the matters alleged by Mr. Garmon in his recusal motions, Judge Swann was a named defendant in a lawsuit filed by Leon Garmon on behalf of several black citizens of Etowah County that challenged, under section 2 of the Voting Rights Act of 1965, 42 U.S.C. [sec.] 1973, the at-large numbered-place election of the four

---

[7] *State of Alabama v. Ronnie O. Rampey*, CC-81-303-Sw (Circuit Court of Etowah County, Alabama).

[8] **After Judge Swann set aside the order granting summary judgment and recused himself, which Mr. Garmon had requested, the case was settled for $7,500.00.**

circuit judges in Etowah County, including Judge Swann himself. In that case, *Lawrence C. Presley, et al. v. Julius S. Swann, Jr., et al.*, CV-91-N-2522-M, in the United States District Court for the Northern District of Alabama, the court has denied the defendants' motion for summary judgment and the parties await setting of a trial date.[9]

Of the charges brought in ASB-90-775, Mr. Garmon was found ***not guilty*** of having "knowingly [made] *false accusations* against" Judge Swann. (emphasis added). Mr. Garmon was found guilty of the four remaining charges. On these findings of guilty, the Disciplinary Board set Mr. Garmon's punishment at a 45-day suspension from the practice of law in Alabama. (App. B-1).

III. PROCEEDINGS BELOW IN ASB-90-527, A COMPANION DISCIPLINARY PROCEEDING AGAINST MR. GARMON

On June 13, 1990, Judge Swann found Mr. Garmon in direct criminal contempt of court and ordered him

---

[9] Mr. Garmon's complaint in *Presley v. Swann* was predicated on two 1991 decisions of this Court. On June 20, 1991, the Court held unequivocally that section 2 itself, and particularly the "results test" of section 2, applies to the election of state supreme court judges, *Chisom v. Roemer*, 501 U.S. ___ (1991), and state trial court judges. *Houston Lawyers' Association v. Texas Attorney General*, 501 U.S. ___ 379 (1991). A related case is pending before the United States Court of Appeals for the Fifth Circuit, on *en banc* submission, *Southern Christian Leadership Conference, et al. v. James H. Evans, et al.*, No. ___, which directly challenges the at-large election of circuit and district court judges in several Alabama judicial circuits. In his lawsuit, Mr. Garmon challenges the at-large election of circuit court judges in the 16th Judicial Circuit of Alabama (Etowah County), which circuit is not included in the *Southern Christian Leadership Conference* action.

incarcerated in the Etowah County jail for a six-hour term. Judge Swann's finding of contempt was based upon certain statements and allegations of impropriety made against Judge Swann by Mr. Garmon in an oral motion to recuse made on June 11, 1990, prior to the commencement of the felony criminal trial in *State v. Terry M. Alford*, case numbers CC-88-382.01-JSS and CC-88-382.02-JSS, before Judge Swann.[10]

After an evidentiary hearing on October 2, 1992, the Disciplinary Board found Mr. Garmon **NOT GUILTY** of **ALL CHARGES** brought against him in ASB-90-527. Judgment of not guilty was entered on those findings on October 2, 1992.

IV. JUDGE SWANN'S DEPOSITION, HIS DEATH, AND THE STATE BAR'S USE OF THAT DEPOSITION AS EVIDENCE AGAINST MR. GARMON

On September 2, 1992, pursuant to the discovery provisions of the Alabama Rules of Civil Procedure, Mr. Garmon obtained the oral deposition of Judge Swann in ASB-90-775 and ASB-90-527.

Judge Swann died of an apparent heart attack on Friday, September 4, 1992, two days after his oral deposition in ASB-90-527 and ASB-90-775, and prior to the October 1, 1992, *ore tenus* final hearing in those matters.

---

[10] This summary of the proceedings in this matter is taken from the Alabama Supreme Court's opinion in *Ex parte Garmon*, No. 1900644 (Ala., June 14, 1991), which reversed and rendered Judge Swann's judgment of contempt against Mr. Garmon. That opinion has not been reported in the Southern Reporter, Second Series, but is included in the appendix to this petition. (App. E-29).

The Alabama State Bar then moved the Disciplinary Board, under Rule 32(a)(3)(A), Ala.R.Civ.P., for "preadmission of the deposition of the Honorable Julius S. Swann, Jr., deceased" as substantive evidence against Leon Garmon in the final hearings in these cases. Mr. Garmon objected to that request for admission of the deposition saying that use of that deposition in a quasi-criminal proceeding is "manifestly unjust and fundamentally unfair" in that it deprives Mr. Garmon of his right to confront and cross-examine his primary accuser, U.S. Const. Amend. VI, and because it permits the disciplinary board to consider a witnesses' testimony in a vacuum without actually hearing, seeing the demeanor and judging the credibility of the witnesses.

On October 1, 1992, at the guilt-phase hearing in these cases, the Disciplinary Board admitted Judge Swann's deposition into evidence over Mr. Garmon's objection.

V. MR. ROBERTSON'S COMPLAINT IN ASB-90-632 REGARDING MR. GARMON'S LETTER TO THE FANCHIERS

Mr. Garmon represented Billy Fanchier, his wife Joyce Fanchier, and their daughter Joyce Marie Fanchier in a products liability lawsuit against General Motors Corporation arising from an automobile accident in which Joyce Marie Fanchier was injured. Trial of that lawsuit resulted in a verdict in favor of General Motors Corporation and against the Fanchiers.

Thereafter, without telling Mr. Garmon that they discharged him as their attorney, the Fanchiers saw Gadsden attorney Kenneth P. Robertson, Jr. On June 28, 1990, Mr. Robertson wrote a letter to Mr. Garmon, which was signed by all three of the Fanchiers, accusing him of

having committed legal malpractice in the preparation and trial of the Fanchiers' case against General Motors, and stating Mr. Robertson's intention to sue Mr. Garmon on behalf of the Fanchiers for that malpractice.[11]

A copy of Leon Garmon's July 27, 1990, letter was sent to Billy Fanchier, *as well as to J. Anthony McLain,* the assistant General Counsel of the Alabama State Bar.

On June 19, 1992, Mr. Robertson filed formal charges against Leon Garmon in connection with his communication with the Fanchiers.

The Disciplinary Board found Mr. Garmon guilty of violating DR-7-104(A)(1), but *NOT* guilty of violating DR-1-102(A)(6). (App. B-3). For punishment on its findings of guilty, the Disciplinary Board imposed a public reprimand of Mr. Garmon without general circulation. (App. B-3).

SUMMARY OF ARGUMENT

Before the Disciplinary Board of the Alabama State Bar and on direct appeal to the Alabama Supreme Court, Mr. Garmon clearly and unequivocally challenged on federal constitutional grounds the attorney disciplinary charges brought against him for having filed four motions seeking the recusal of Judge Swann. Petitioner has a constitutionally protected right of free speech, U.S. Const. Amends. I, XIV, which he does not surrender by

---

[11] No such malpractice lawsuit was ever filed. Indeed, Mr. Robertson did not undertake the most basic research to determine the merits of his malpractice claims in that he did not obtain a transcript of the trial of the Fanchiers' case against General Motors in order to gauge the competency of Mr. Garmon's actions during that trial.

voluntarily undertaking his position as a licensed attorney. As an officer of the court and a citizen, Mr. Garmon has the constitutionally protected right and duty to criticize, in proper and respectful terms and through legitimate channels, the acts of courts and judges. The precise question raised by the petitioner here is whether Mr. Garmon may be properly disciplined for making allegations of impropriety against a particular judge in four nearly identical recusal motions filed in court, which allegations have been *judicially determined not to be false,*[12] when there is no evidence that the making of those allegations disrupted, obstructed, hindered or impeded the administration of justice.

In this case, Mr. Garmon was found NOT GUILTY of making *any false accusations* against Judge Swann, and the evidence does not reveal that the subject motions for recusal disrupted or impeded the administration of justice in Judge Swann's court. If accusations of impropriety made by a lawyer in a recusal motion against a judge are not false and do not impede, obstruct, disrupt or hinder the administration of justice, any discipline of the lawyer for making such accusations violates the subject lawyer's free speech rights under the First Amendment. *Re Sawyer,* 360 U.S. 622 (1959); *Polk v. State Bar of Texas,* 374 F.Supp. 784 (N.D. Tex. 1974). The potentially chilling effect of a mandatory state bar's prosecution of a lawyer for making a recusal motion, which does not contain any falsehoods about the target judge or disrupt the proceedings conducted by or before that judge, is enormous. With this

---

[12] Mr. Garmon was found *not* guilty of the charges in both ASB-90-775 and ASB-90-527 alleging that he knowingly made ***false accusations*** against Judge Swann. DR-8-101(A). (App. B-1).

case as precedent, no lawyer concerned about his future in the profession will file a motion for a judge's recusal, which will necessarily contain allegations that the judge is less than impartial and may accuse the judge of outright ethical transgressions, for fear of retaliation by the organized bar, perhaps at the urging and insistence of the target judge, for daring to impugn the impartiality or conduct of the judge.

The finding of guilty in ASB-90-632 was made in clear violation of Mr. Garmon's First Amendment right to communicate true information to another, the Fanchiers, in order to defend himself against groundless charges of malpractice by Mr. Robertson. *New York Times Co. v. Sullivan*, 376 U.S. 254; *Garrison v. Louisiana*, 379 U.S. 64. Throughout the proceedings below in this case, there was no allegation and no finding that any information contained in Mr. Garmon's July 27, 1990, letter to Mr. Robertson, a copy of which was sent to the Fanchiers and the Alabama State Bar, was not true. The findings of guilty in ASB-90-632 amount to state sanction of a constitutionally impermissible infringement on Mr. Garmon's right of free speech secured by the First Amendment to the United States Constitution, as applied to the states by the 14th Amendment. Mr. Garmon's letter to Mr. Robertson, its attendant copy to the Fanchiers and the Alabama State Bar, since the statements of fact therein contained were true, and there has been no finding that those statements are false, is constitutionally protected speech. *New York Times Co. v. Sullivan*, 376 U.S. 254; *Garrison v. Louisiana*, 379 U.S. 64.

ARGUMENT

I.

SUBJECTING A LAWYER, MR. GARMON IN THIS CASE, TO BAR DISCIPLINARY CHARGES FOR MAKING ALLEGATIONS OF BIAS, PREJUDICE OR IMPROPRIETY AGAINST A JUDGE IN A RECUSAL MOTION, WHICH ALLEGATIONS WERE MADE IN GOOD FAITH BY THE LAWYER AND WERE JUDICIALLY FOUND NOT TO BE FALSE, FILED ON BEHALF OF HIS CLIENT, CONSTITUTES AN UNWARRANTED AND IMPERMISSIBLE INFRINGEMENT OF THE LAWYER'S FIRST AMENDMENT RIGHT OF FREE SPEECH, AND PERMITTING SUCH IMPROPER PROSECUTION OF LAWYERS WILL HAVE A CHILLING EFFECT ON ALL LAWYERS, CAUSING THEM TO INTENTIONALLY FAIL TO MAKE RECUSAL MOTIONS IN CASES IN WHICH THOSE MOTIONS ARE NECESSARY TO PRESERVE THE RIGHTS OF THEIR CLIENTS FOR FEAR OF PROSECUTION AND DISCIPLINE BY THE BAR

This case presents a ***significant policy question*** WHICH HAS NOT BEEN BUT SHOULD BE ADDRESSED BY THIS COURT, viz: ***To what extent are a lawyer's accusations of impropriety against a judge, made in a recusal motion directed toward that judge, protected by the First Amendment free speech guarantee?*** This constitutional dispute of first impression in this Court pits the enormous power and authority of an integrated mandatory state bar association to regulate the conduct and livelihood of lawyers practicing within its jurisdiction against the federal free speech rights of one of those lawyers, acting in the role of advocate for his clients. The Alabama Supreme Court's no-opinion *per curiam* affirmance of the Alabama State Bar Disciplinary Board's findings of guilty and discipline in this case

compounds the gross infringement of Mr. Garmon's basic rights of free speech and, if the punishment meted out against Mr. Garmon in this case is allowed to stand, will have a chilling effect nationwide on a fundamental role of the advocate, viz: To assure that his client's cause is heard by a fair and impartial tribunal harboring no potential prejudice toward the client or the cause.

The constitutional question presented by this petition has not before been addressed by this Court in the same context as in this case. The Alabama Supreme Court's no-opinion *per curiam* affirmance in this case decides an important question of federal constitutional law, which question has not been but should be decided by this Court. *See* Rule 10.1(c) of the Rules of this Court.

A.

FACTUAL CONTEXT OF THIS PETITION

The Bar filed formal disciplinary charges against Mr. Garmon in ASB-90-775 for making the allegations contained in the four written domestic relations recusal motions. Just as it did in ASB-90-527, in ASB-90-775 the Bar alleged that, in his four recusal motions, Mr. Garmon "knowingly [made] false accusations against" Judge Swann in violation of Disciplinary Rule DR-8-101(B) of the Code of Professional Responsibility of the Alabama State Bar, and that the recusal motion was "prejudicial to the administration of justice," DR-1-102(A)(5). The Bar also charged that Mr. Garmon's making of that recusal motion amounted to "undignified and discourteous conduct which is degrading to a tribunal," DR-7-106(B)(2), that "reflect[ed] adversely on [Mr. Garmon's] fitness to practice law." DR-102(A)(6).

After a consolidated *ore tenus* hearing in ASB-90-527 and ASB-90-775, the Disciplinary Board of the Alabama

State Bar, the trier of fact in Alabama's attorney disciplinary scheme, found Mr. Garmon ***NOT GUILTY*** of ***ALL*** the ethical charges brought in ASB-90-527.

In ASB-90-775, the Disciplinary Board found Mr. Garmon ***NOT GUILTY*** of making "false accusations" of impropriety against Judge Swann, but found him guilty of the four remaining charges. For discipline in ASB-90-775, the Disciplinary Board ordered that Mr. Garmon be suspended from the practice of law for a term of 45 days.

In his testimony before the Disciplinary Board, Mr. Garmon stated that he believed the allegations he made against Judge Swann to be true. Mr. Garmon testified that those allegations of impropriety were based on matters related to him by his client, Mr. Alford, and from his own personal knowledge and observation of, and information and belief about Judge Swann and his personal, political, business and other public activities.

There was no evidence of any disruption of the judicial process caused by the recusal motion made by Mr. Garmon in Mr. Alford's criminal case. Indeed, after Judge Swann denied that recusal motion, the trial proceeded to a jury verdict.[13] Likewise, there was no evidence of any disruption of the judicial process caused by the filing of the four domestic relations recusal motions; those motions were denied summarily and the cases proceeded with Judge Swann sitting as the trier of fact.

With the findings of the Disciplinary Board in ASB-90-527, and the no-opinion *per curiam* affirmance of those findings by the Alabama Supreme Court in ASB-90-775, there is no finding that any statement or

---

[13] The jury found Mr. Alford not guilty of all the criminal charges brought against him in that case.

allegation of impropriety made by Mr. Garmon against Judge Swann was false. Indeed, Mr. Garmon was specifically found not guilty of the charges expressly alleging that he had made "false accusations" of impropriety against Judge Swann.

B.

LEGAL CONTEXT OF THIS PETITION

When a lawyer is admitted to the bar, he does not surrender his freedom of speech, but that freedom must be tempered to conform to the high professional standards expected of lawyers. *See Nebraska State Bar Association v. Michaelis*, 210 Neb. 545, 316 N.W.2d 46, 52 (1982); *In re Johnson*, 240 Kan. 334, 729 P.2d 1175 (1986). Petitioner has a constitutionally protected right of free speech, U.S. Const. Amends. 1, 14, which he does not surrender by voluntarily undertaking his position as a licensed attorney. *See Thatcher v. United States*, 212 F. 801 (6th Cir. 1914).

The precise question raised by the petitioner here is whether, as the Alabama State Bar urged below and Alabama's courts apparently found, although it is unclear because no opinion was rendered, Mr. Garmon may be properly disciplined for making allegations of impropriety against a particular judge in four nearly identical recusal motions filed in court, which allegations have been *judicially determined not to be false*, when there is no evidence that the making of those allegations disrupted, obstructed, hindered or impeded the administration of justice. Stated differently, may the Alabama State Bar permissibly discipline Mr. Garmon for making allegations of impropriety that (1) were not false, (2) were not made insolently or profanely, (3) did not cause or threaten to cause a disruption in the conduct of the proceedings

before the subject judge and (4) were made by Mr. Garmon based on his genuine belief that the allegations of impropriety were true and that the impropriety required the judge's recusal from sitting as the trier of fact in the cases in which those recusal motions were filed.

C.

SOUND CONSTITUTIONAL REASONING REQUIRES A FEDERAL RULE THAT, ABSENT A FINDING THAT ALLEGATIONS OF IMPROPRIETY ON THE PART OF A PARTICULAR JUDGE WERE MADE BY A LAWYER WHO KNEW THE ALLEGATIONS WERE FALSE OR IN RECKLESS DISREGARD OF THEIR TRUTH OR FALSITY, THE SUBJECT LAWYER IS NOT TO BE DISCIPLINED FOR MAKING SUCH ALLEGATIONS OF IMPROPRIETY UNLESS THE MAKING OF THOSE ALLEGATIONS OBSTRUCTS, DISRUPTS, HINDERS OR IMPEDES THE ADMINISTRATION OF JUSTICE

In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), a civil libel action from Alabama, this Court held that "the Constitution delimits a State's power to award damages for libel in actions brought by public official against critics of their official conduct." 376 U.S. at 708. The Court found that the "constitutional guarantees require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' – that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279-280. The *New York Times* rule was extended to the criminal sector in *Garrison v. Louisiana*, 379 U.S. 64 (1964), in which a lawyer was charged with criminal libel for making statements disparaging of the conduct of eight judges. In *Garrison*, the Court held that lawyer criticism of judicial officials

does not lose its constitutional protection unless shown to be a "calculated falsehood" made with knowledge of its falsity or with a reckless disregard as to the statement's truth or falsity. *But cf., Louisiana State Bar Association v. Karst*, 428 So.2d 406, 409 (La. 1983) (in disciplinary proceeding, knowledge of falsity is not determined by the sincerity of lawyer's belief in the statements but rather by the reasonableness of that belief and the good faith of the lawyer in making the allegations of impropriety).

In Alabama's attorney disciplinary scheme, there are, of course, no "criminal safeguards." Formal disciplinary charges are brought by the Alabama State Bar's General Counsel, in the name of the Alabama State Bar. Rule 12(e)(1), Ala.R.Disc.P. There is no requirement of indictment by any body akin to a grand jury, nor is there any evidentiary determination of probable cause as by a preliminary hearing prior to indictment in criminal cases. Proof of a respondent lawyer's guilt in disciplinary proceedings is by "clear and convincing evidence," Rule 19(a), Ala.R.Disc.P., not the more rigorous "proof beyond a reasonable doubt."

If accusations of impropriety made by a lawyer in a recusal motion against a judge are not false and do not impede, obstruct, disrupt or hinder the administration of justice, any discipline of the lawyer for making such accusations violates the subject lawyer's free speech rights under the First Amendment. *Re Sawyer*, 360 U.S. 622 (1959); *Polk v. State Bar of Texas*, 374 F.Supp. 784.

The potentially chilling effect of a mandatory state bar's prosecution of a lawyer for making a recusal motion, which does not contain any falsehoods about the target judge or disrupt the proceedings conducted by or

before that judge, is enormous. With this case as precedent, no lawyer concerned about his future in the profession will file a motion for a judge's recusal, which will necessarily contain allegations that the judge is less than impartial and may accuse the judge of outright ethical transgressions, for fear of retaliation by the organized bar, perhaps at the urging and insistence of the target judge, for daring to impugn or question the impartiality or conduct of the judge.

In his affidavit, submitted by Mr. Garmon and received by the Disciplinary Board as evidence at the final hearing in this case, former Alabama State Bar prosecutor John A. Yung, IV, succinctly described the confrontational nature of a recusal motion, and the lack of ethical transgression in a lawyer's filing such a motion:

> 1. My name is John A. Yung, IV. I do solemnly swear that the following statements are true and correct in every particular. . . .
>
> 5. For a period of ten and one-half (10 1/2) years, from 1980 to 1991, I was an assistant general counsel for the Alabama State Bar. A substantial part of my duties as assistant general counsel was to review disciplinary complaints against attorneys and make recommendations, on behalf of the Bar, to the Disciplinary Commission as to disposition of those complaints. After receiving my recommendation, the Disciplinary Commission would vote to dismiss the complaint with no disciplinary action, to impose private or public discipline, or direct that formal disciplinary charges be filed against the subject lawyer. . . .
>
> 10. *My opinion is that a motion to recuse may necessarily contain matters that may be offensive or upsetting to the judge who is the subject of that motion.* Barring a full hearing, the only practical

> way that denial of a motion to recuse can be successfully preserved for appeal is to set out in the motion to recuse all the grounds and factual averments supporting the judge's recusal. *My opinion is that such allegations, while they may be offensive to the judge's sensibilities, if made with the good faith and reasonable belief that they were true, do not amount to unethical conduct. . . .*

(emphasis added).

At issue in the purest recusal motion is the judge's strongly held belief in his "duty to sit," *Potashnick v. Port City Construction Co.*, 609 F.2d 101 (5th Cir. 1980), versus the parties' bringing to his attention certain matters, and making certain personal allegations against him, that challenge his belief that he can, in most all cases, be fair. A recusal motion is bound to be offensive to a judge because it is saying to him, for whatever reason, that he cannot or will not be fair to the party or lawyer seeking to remove him from a case. While it is not necessary that the movant show "actual demonstrated prejudice," but only circumstances that show the judge's "impartiality might reasonably be questioned," that does not ameliorate the offensive nature of a recusal motion. *See United States v. Alabama*, 828 F.2d 1532 (11th Cir. 1987), *cert. denied sub nom. Board of Trustees of Alabama State University v. Auburn University*, 487 U.S. 1210 (1988).[14]

---

[14] In an article in the January 25, 1993, *National Law Journal*, United States District Judge William M. Acker, Jr., of the Northern District of Alabama, wrote:

> "Chief Judge Howard T. Markey of the U.S. Circuit Court for the District of Columbia, probably our most highly respected philosopher in the area of judicial ethics, pointed out in a recent article published by the National Legal Center for the Public Interest . . . : 'In choosing between appearances and realities,

II.

SINCE, IN QUASI-CRIMINAL STATE BAR DISCIPLINARY PROCEEDINGS, AN ACCUSED LAWYER HAS MOST, IF NOT ALL, THE SUBSTANTIVE RIGHTS OF A CRIMINAL DEFENDANT, THE USE OF THE PRE-TRIAL DISCOVERY DEPOSITION OF MR. GARMON'S ACCUSER, WHO DIED PRIOR TO THE *ORE TENUS* HEARING BEFORE THE DISCIPLINARY AUTHORITY, AS THE SOLE EVIDENCE IN SUPPORT OF THE CHARGES AGAINST MR. GARMON, EFFECTIVELY PREVENTED MR. GARMON FROM CONFRONTING HIS ACCUSER AT TRIAL, AND VIOLATES THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT

A fundamental right available to a criminal defendant, and a lawyer facing quasi-criminal disciplinary proceedings as a result of which he may be disbarred or suspended from the practice of law, is the Sixth Amendment right to confront and cross-examine his accusers. The *primary* purpose of the Confrontation Clause of the Sixth Amendment, made applicable to the states by the Fourteenth Amendment, is to give the accused an opportunity to fully and effectively cross examine the declarant, because when the declarant does not testify at trial another purpose of the Confrontation Clause – the finder of fact's ability to observe the demeanor of the declarant while he testifies – is negated. This purpose has traditionally constituted the core of the Confrontation Clause

---

appearances are all the general public has to go by. In virtually every instance of reasonably asserted conflicts between unethical appearances and ethical realities, therefore, *appearances must win.*' "

"Why Judge Resigned from ABA," ***National Law Journal***, Jan. 25, 1993, at 17 (emphasis added).

protection. *California v. Green*, 399 U.S. 149; *Coy v. Iowa*, 487 U.S. 1012.

III.

THE FINDINGS OF GUILTY IN ASB-90-632, DEALING WITH MR. GARMON'S LETTER TO THE FANCHIERS, VIOLATE MR. GARMON'S FIRST AMENDMENT RIGHT TO COMMUNICATE TRUE INFORMATION TO PERSONS HE REASONABLY BELIEVES TO BE HIS CLIENTS IN DEFENSE OF FRIVOLOUS CHARGES OF LEGAL MALPRACTICE, AND FURTHER VIOLATE HIS SIXTH AMENDMENT RIGHT TO CONFRONT AND CROSS-EXAMINE HIS ACCUSER

The facts of and circumstances surrounding the finding of guilty in ASB-90-632 reveals that the finding was made in clear violation of Mr. Garmon's First Amendment right to communicate true information to another, the Fanchiers, in order to defend himself against groundless charges of malpractice by Mr. Robertson. *New York Times Co. v. Sullivan*, 376 U.S. 254; *Garrison v. Louisiana*, 379 U.S. 64. Throughout the proceedings below in this case, there was no allegation and no finding that any information contained in Mr. Garmon's July 27, 1990, letter to Mr. Robertson, a copy of which was sent to the Fanchiers, was not true.

IV.

THE PUNISHMENT IMPOSED BY THE DISCIPLINARY BOARD OF THE ALABAMA STATE BAR IN THESE CASES IS EXCESSIVE AND DISPROPORTIONATE TO THE OFFENSES COMMITTED AND IS CONTRARY TO MR. GARMON'S DUE PROCESS AND EQUAL PROTECTION RIGHTS AS WELL AS HIS RIGHT TO BE PROTECTED AGAINST CRUEL AND UNUSUAL PUNISHMENT

Neither this Court nor Alabama's Supreme Court has adopted a "bright-line" test for determining whether or not the Bar's discipline is excessive, thereby violating the accused attorney's property interest in the practice of law, or appropriate. Because of the lack of a bright-line test, there is no controlling "authority" to discuss or cite as to why the punishment in these cases is excessive to the point of constituting a federal constitutional violation. Rather, Mr. Garmon seeks this Court's determination that, as a matter of due process and fundamental fairness, lawyers in Alabama and the nation who commit the same type violations found in these cases should not suffer discipline that poses a very real threat to their continued economic livelihood. U.S. Const. Amend. V, VIII, XIV.

Even when a former Alabama State Bar president, Gary C. Huckaby, was investigated by the Internal Revenue Service for willful failure to file an income tax return for four (4) years, (1985, 1986, 1987, and 1988), and pleaded guilty to failing to pay income taxes since 1988, the Alabama State Bar determined that the convicted former Bar president should be suspended for only forty-five (45) days, which would permit his automatic reinstatement after serving that suspension. *See Huckaby v.*

Alabama State Bar, 631 So.2d 855 (Ala. 1993).[15] After further investigation, the Disciplinary Commission ruled that Mr. Huckaby should serve a 45 day suspension for his failure to pay income taxes. On September 3, 1994, a two by two and one-half inch (2" x 2 1/2") notice of suspension was run in the *Huntsville Times,* located in the legal classified section. This notice was to inform the general public of his 45-day suspension due to his guilty plea for a criminal misdemeanor for wilful failure to file income tax return. (App. E-63) Mr. Huckaby's serious federal crime and the Bar's minimal punishment for that crime, when compared to and contrasted with the "offenses" of which Mr. Garmon was found guilty in these cases and the extremely serious punitive discipline imposed for those "offenses," does not evidence the

---

[15] Gary Carlton Huckaby of Huntsville, was president of the Alabama State Bar in 1988-1989. Mr. Huckaby had failed to pay income taxes for four years. (App. E-35) He was indicted for willful failure to pay income tax for the year 1988. On April 3, 1992, Mr. Huckaby plead guilty in the United States District Court for the Northern District of Alabama, case number CR-92-P-039-NE of the criminal offense of willful failure to file an income tax return for tax year 1988, a misdemeanor which said return was due to be filed on or before August 15, 1989. Mr. Huckaby's plea agreement made it possible for him to serve no jail time, be put on probation and pay a substantial fine in installments. That criminal conviction is now final for all purposes. (App. E-37).

Mr. Huckaby was at the time of his conviction, and is presently, a member of one of the largest lawfirm's in the State of Alabama, Bradley, Arant, Rose & White, with offices in Birmingham and Huntsville. Mr. Huckaby is a member of the Huntsville Branch.

On December 16, 1993, this Court reversed the Disciplinary Commission's order suspending Mr. Huckaby from the practice of law for 45 days and remanded the case to the Disciplinary Commission. (App. E-56)

desired "consistency of punishment" that is the goal of the attorney disciplinary process in Alabama, as required by the equal protection clause and declared by this Court in adopting Standard 1.3(3) of the Alabama Standards for Imposing Lawyer Discipline.[16] U.S. Const. Amends. V, XIV.

The conduct for which Mr. Garmon is punished in these cases does not warrant a 45-day suspension. When other discipline is available, this punishment (45-day suspension) is excessive, unjust and wholly inappropriate. U.S. Const. Amend. V, VIII, XIV.

CONCLUSION

The decision of the Supreme Court of Alabama affirming Mr. Garmon's conviction for violating the attorney disciplinary rules is an infringement of the rights of Mr. Garmon, as well as other members every state's bar, to free speech and to confront his accuser in defense of such disciplinary charges. The judgment of the Alabama

---

[16] Another Huntsville attorney, Barbara C. Miller, a solo practitioner, was given a public reprimand for " . . . failure to comply with certain rules relating to advertising by lawyers in the State of Alabama." Pursuant to Rule 33 of the Alabama rules of Disciplinary Procedures, the *Huntsville Times*, ran a four by six and one-half inch (4" x 6 1/2") notice, provided by the Alabama State Bar, and located it in the main body of newspaper. (App. E-63)

When compared and contrasted with the size and location of Ms. Miller's required notice in the *Huntsville Times*, it appears that the Bar's interpretation of Standard 1.3(3) of the Alabama Standards for Imposing Lawyer Discipline as it pertains to Mr. Huckaby and Ms. Miller does not guarantee "consistency of punishment" or notice to the general public of disciplinary action taken by the Alabama State Bar. The costs of the public notice assessed Barbara C. Miller were about triple the costs for Gary C. Huckaby's notice in the *Huntsville Times*.

State Bar's Disciplinary Board in these proceedings, and the affirmance of the Disciplinary Board's judgments by the Supreme Court of Alabama, ignores Mr. Garmon's First Amendment rights. Further, use of the deceased accuser's deposition in ASB-90-775 and other out-of-court statements in both ASB-90-775 and ASB-90-632 as affirmative evidence prejudices the judicial process itself in that the trier of fact, the Disciplinary Board in this case, is wholly unable to judge the absent witness's demeanor and credibility, an intangible but fundamentally important duty of the trier of fact that can be performed only by the witness's in-person appearance.

From its actions, or no-opinion inactions, it is obvious that the Alabama court will do nothing to protect the members of its own bar from gross and far-ranging constitutional deprivation, and will ignore, when it is convenient to do so, the fundamental constitutional rights of its own citizens. For that reason, and because of the potential impact of the Alabama court's decision on the First and Sixth Amendment rights of attorneys across the nation, this Court should exercise its jurisdiction and reaffirm the existence and reach of the constitutional protections here trampled by the Alabama Supreme Court.

The judgment of the court below should be reversed and set aside and this cause remanded to that court for entry of a judgment in favor of Mr. Garmon in ASB-90-775 and ASB-90-632.

Respectfully submitted,

JULIAN L. MCPHILLIPS, JR.
Attorney for Petitioner
MCPHILLIPS, SHINBAUM & GILL
Post Office Box 64
516 South Perry Street
Montgomery, Alabama 36101
(205) 262-1911
November 1, 1994

TABLE OF CONTENTS

Page

SUPREME COURT OF ALABAMA, APRIL 29, 1994, 1920598 & 1920599, NO-OPINION AFFIRMANCE OF ASB-90-775 (SWANN) & ASB-90-632 (FANCHIER)..... A-1

FINDINGS AND ORDER OF THE DISCIPLINARY BOARD, ASB-90-775, OCTOBER 30, 1992..... B-1

FINDINGS AND ORDER OF THE DISCIPLINARY BOARD, ASB-90-632, OCTOBER 30, 1992..... B-3

DISCIPLINARY BOARD'S ORDER OF DECEMBER 15, 1992, DENYING GARMON'S POST-JUDGMENT MOTION IN ASB-90-775..... B-5

DISCIPLINARY BOARD'S ORDER OF DECEMBER 15, 1992, DENYING GARMON'S POST-JUDGMENT MOTION IN ASB-90-632..... B-7

SUPREME COURT OF ALABAMA, JUNE 17, 1994, 1920598 & 1920599, ORDER OVERRULING APPLICATION FOR REHEARING OF ASB-90-775 (SWANN) & ASB-90-632 (FANCHIER) C-1

GARMON'S PRINCIPAL BRIEF IN APPEAL OF ASB-90-775 & ASB-90-632, SUPREME COURT NOS. 1920598 & 1920599, *PARTIAL* E-1

ALABAMA SUPREME COURT DECISION IN ***EX PARTE LEON GARMON,*** JUNE 14, 1991 (CONTEMPT CASE)..... E-29

Gadsden Times Newspaper article regarding Gary C. Huckaby E-35

Gary C. Huckaby indictment and plea agreement .. E-37

U.S. Supreme Court's Decision regarding suspension of Gary C. Huckaby..... E-56

TABLE OF CONTENTS – Continued

Page

Gary C. Huckaby's 2 x 2 1/2" notice of suspension .. E-63

Barbara C. Miller's 4 x 6 1/2" notice of public reprimand..... E-63

STATE OF ALABAMA – JUDICIAL DEPARTMENT
THE SUPREME COURT
OCTOBER TERM, 1993-94

1920598, 1920599

Leon Garmon v. Alabama State Bar
Appeals from Alabama State Bar Disciplinary Committee
ASB-90-775, 90-632

PER CURIAM

AFFIRMED. NO OPINION.

See Rule 53(a)(1), Rule 53(a)(2)(A), and Rule 53(a)(2)(F), Ala. R. App. P., and *Hunt v. Disciplinary Board of the Alabama State Bar*, 381 So.2d 52 (Ala. 1980).

Almon, Shores, Houston, Kennedy, and Ingram, JJ., concur.

BEFORE THE DISCIPLINARY BOARD OF THE ALABAMA STATE BAR

IN THE MATTER OF	)	
	)	
MILFORD LEON GARMON,	)	CASE NO.
AN ATTORNEY AT LAW	)	ASB 90-775

FINDINGS AND ORDER

The Disciplinary Board having held the final hearing in this matter as scheduled, and having heard and considered all of the evidence presented by the State Bar, as well as all of the evidence presented by and on behalf of the respondent attorney, the Disciplinary Board finds the facts to be as alleged in the formal charges and finds the respondent attorney to be GUILTY of Charge I, Charge II, Charge III, and Charge IV and NOT GUILTY of Charge V in this matter, and it is further

ORDERED that the respondent attorney be SUSPENDED from the practice of law in the state of Alabama for a period of 45 days effective upon order of the Supreme Court of Alabama.

DONE this the 30th day of October, 1992.

/s/ A.J. Coleman
A.J. Coleman, Chairman
Disciplinary Board, Panel I
Alabama State Bar
P.O. Box 1685
Decatur, AL 35602

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Order was served upon the respondent attorney's counsel, Julian McPhillips, Post Office Box 64, Montgomery, Alabama 36101, and J. Anthony McLain, Assistant General Counsel, Post Office Box 671, Montgomery, Alabama, 36101, by United States mail, postage prepaid, on this the 6th day of November, 1992.

/s/ A.J. Coleman
A.J. Coleman, Chairman
Disciplinary Board, Panel I
Alabama State Bar

BEFORE THE DISCIPLINARY BOARD OF THE ALABAMA STATE BAR

IN THE MATTER OF	)	
	)	
MILFORD LEON GARMON,	)	CASE NO.
AN ATTORNEY AT LAW	)	ASB 90-632

FINDINGS AND ORDER

The Disciplinary Board having held the final hearing in this matter as scheduled, and having heard and considered all of the evidence presented by the State Bar, as well as all of the evidence presented by and on behalf of the respondent attorney, the Disciplinary Board finds the facts to be as alleged in the formal charges and finds the respondent attorney GUILTY of Charge I and NOT GUILTY of Charge II in this matter, and it is further

ORDERED that the respondent attorney receive a PUBLIC REPRIMAND WITHOUT GENERAL PUBLICATION as discipline for said violation.

DONE this the 30th day of October, 1992.

/s/ A.J. Coleman
A.J. Coleman, Chairman
Disciplinary Board, Panel I
Alabama State Bar
P.O. Box 1685
Decatur, AL 35602

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Order was served upon the respondent attorney's counsel, Julian McPhillips, Post Office Box 64, Montgomery, Alabama 36101, and J. Anthony McLain, Assistant General Counsel, Post Office Box 671, Montgomery, Alabama, 36101, by United States mail, postage prepaid, on this the 6th day of November, 1992.

/s/ A.J. Coleman
A.J. Coleman, Chairman
Disciplinary Board, Panel I
Alabama State Bar

BEFORE THE DISCIPLINARY BOARD
OF THE ALABAMA STATE BAR

IN THE MATTER OF	)	
LEON GARMON,	)	
AN ATTORNEY	)	CASE NUMBERS:
AT LAW OF THE	)	ASB 90-775
STATE OF ALABAMA	)	

ORDER OVERRULING POST TRIAL MOTIONS

After due consideration, Respondent's post trial motions filed in the foregoing cause are overruled.

Done by order of the Disciplinary Board this 15th day of December, 1992.

/s/ A. J. Coleman
A. J. Coleman, Acting Chairman
Disciplinary Board, Panel I
Alabama State Bar
P.O. Box 1685
Decatur, AL 35602
(205) 353-6824

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served upon the following:

J. Anthony McLain
Assistant General Counsel
Alabama State Bar
P.O. Box 671
Montgomery, Alabama 36101

Milton Leon Gorman, Respondent
945 Forrest Avenue
Gadsden, Alabama 35901

and his counsel:

Julian L. McPhillips, Jr.
P.O. Box 64
Montgomery, AL 36106

via First Class Mail, postage prepaid, on this the 17th day of December, 1992.

/s/ A. J. Coleman
A. J. Coleman, Acting Chairman
Disciplinary Board, Panel I
Alabama State Bar

BEFORE THE DISCIPLINARY BOARD
OF THE ALABAMA STATE BAR

IN THE MATTER OF LEON GARMON, AN ATTORNEY AT LAW OF THE STATE OF ALABAMA	)))))	CASE NUMBERS: ASB 90-632 (Filed Dec. 21, 1992)

ORDER OVERRULING POST TRIAL MOTIONS

After due consideration, Respondent's post trial motions filed in the foregoing cause are overruled.

Done by order of the Disciplinary Board this 15th day of December, 1992.

/s/ A. J. Coleman
A. J. Coleman, Acting Chairman
Disciplinary Board, Panel I
Alabama State Bar
P.O. Box 1685
Decatur, AL 35602
(205) 353-6824

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served upon the following:

J. Anthony McLain
Assistant General Counsel
Alabama State Bar
P.O. Box 671
Montgomery, Alabama 36101

Milton Leon Gorman, Respondent
945 Forrest Avenue
Gadsden, Alabama 35901

and his counsel:

Julian L. McPhillips, Jr.
P.O. Box 64
Montgomery, AL 36106

via First Class Mail, postage prepaid, on this the 17th day of December, 1992.

/s/ A. J. Coleman
A. J. Coleman, Acting Chairman
Disciplinary Board, Panel I
Alabama State Bar

C-1

IN THE SUPREME COURT OF ALABAMA

June 17, 1994

1920598

Leon Garmon v. Alabama State Bar. (ASB-90-775)

ORDER

The application for rehearing is overruled.

The appellant's request for an order staying the enforcement of the 45-day suspension in Case No. 1920598 (ASB-90-775) is granted. Enforcement of that suspension order is stayed pending this Court's ruling in cases numbered 1921761 (ASB-89-099[A]), 1921762 (ASB-89-173), and 192173 (ASB-89-341).

PER CURIAM – Almon, Shores, Houston, Kennedy and Ingram, JJ., concur.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 17 day of Jun, 1994.

/s/ Robert G. Esdale
Clerk, Supreme Court of Alabama

E-1

IN THE SUPREME COURT OF ALABAMA

1920598 & 1920599

LEON GARMON,

APPELLANT

- VERSUS -

ALABAMA STATE BAR,

APPELLEE

APPEALS FROM THE DISCIPLINARY BOARD OF THE ALABAMA STATE BAR
(ASB-90-632 & ASB-90-775)

BRIEF FOR APPELLANT

ORAL ARGUMENT REQUESTED

Julian L. McPhillips, Jr.
McPhillips, Shinbaum & Gill
516 South Perry Street
Post Office Box 64
Montgomery, Alabama 36101
(205) 262-1911

Michael L. Allsup
945 Forrest Avenue
Gadsden, Alabama 35901
(205) 543-3401

Attorneys for Appellant

TABLE OF CONTENTS

Page

Statement in Support of Request For Oral Argument iv

Table of Cases, Statutes & Other Authorities v

Statement of the Case 1

I. ASB-90-527 2

II. ASB-90-775 4

III. ASB-90-632 6

IV. Imposition of Punishment 7

V. Pre-Trial Motions 8

VI. Post-Trial Proceedings 10

Issues Presented for Review 12

Statement of the Facts 14

I. ASB-90-527: *Sua Sponte* Complaint by The Alabama State Bar Based Upon Citation of Leon Garmon for Criminal Contempt by Judge Julius S. Swann, Jr. 14

A. Motion for Judge Swann's Recusal 14

1. Judge Swann was a Defendant In a Lawsuit Filed by Leon Garmon 17

2. Allegations that Judge Swann's Judicial Actions Were Improperly Influenced by Political Considerations 22

3. Judge Swann was a Defendant in a Voting Rights Case Filed by Leon Garmon Challenging the At-Large Numbered-Place Election of Circuit Court Judges in Etowah County ... 24

II. ASB-90-775: Complaint of Judge Julius S. Swann, Jr., Regarding Motions for His Recusal 25

A. Bar Grievance Filed by Judge Swann.. 25

B. Motions for Judge Swann's Recusal.... 27

C. Judge Swann's September 2, 1992, Deposition As It Relates to the Motions for Recusal 35

D. Filing Motion for Judge Swann's Recusal Without First Obtaining Consent of the Client..... 40

III. ASB-90-632: Complaint of Attorney Kenneth P. Robertson, Jr., Regarding Communication With Billy, Joyce & Joyce Marie Fanchier .. 41

IV. Evidence on the Issue of Discipline..... 45

Argument 53

I. Introduction..... 53

II. Standard of Review 55

III. Grounds Urged for Reversal..... 56

A. Under the Facts and the Law, the Findings of Guilty in ASB-90-775, Relative to the Motions Seeking Judge Swann's Recusal, Are Clearly Erroneous..... 59

1. The Recusal Motions Do Not Constitute A Disciplinary Rule Violation... 63

2. Leon Garmon Did Not Violate Any Disciplinary Rule by Filing a Motion for Judge Swann's Recusal Without First Obtaining the Consent of His Client..... 72

B. The Findings of Guilty Are Contrary to Law..... 74

1. The Findings of Guilty in ASB-90-775 Are Internally Inconsistent and Are Further Inconsistent and Irreconcilable With the Findings Of Not Guilty, on Substantially Similar Facts, in ASB-90-527..... 81

C. The Findings of Guilty Are Contrary to the Evidence..... 86

D. Rule 12(e)(4), Ala.R.Disc.P., Is Unconstitutional on Its Face and As Applied as It Violates the Accused Lawyer's Rights of Due Process of Law..... 92

E. The Punishment Imposed in These Cases Is in Violation of Leon Garmon's Right To Equal Protection of the Law..... 97

Conclusion 102

Certificate of Service of Appellant's Brief 104

Appendix I..... 105

Appendix II 106

* * *

ISSUES PRESENTED FOR REVIEW

I.

WHETHER THE FINDINGS IN ASB-90-775, IN WHICH LEON GARMON WAS FOUND *NOT GUILTY* OF MAKING FALSE ACCUSATIONS OF IMPROPRIETY AGAINST CIRCUIT JUDGE SWANN IN MOTIONS SEEKING JUDGE SWANN'S RECUSAL BUT, AT THE SAME TIME, WAS FOUND *GUILTY* OF BEING DISRESPECTFUL TO JUDGE SWANN IN THOSE SAME RECUSAL MOTIONS, ARE INTERNALLY CONSISTENT AND RECONCILABLE UNDER THE LAW.

II.

WHETHER THE DISCIPLINARY BOARD'S FINDINGS OF *NOT GUILTY* AS TO ALL CHARGES IN ASB-90-527, IN WHICH LEON GARMON WAS CHARGED WITH MAKING FALSE ACCUSATIONS OF IMPROPRIETY AGAINST JUDGE SWANN AND BEING DISRESPECTFUL TO JUDGE SWANN IN A MOTION FOR RECUSAL, IS CONSISTENT AND RECONCILABLE WITH THE FINDINGS IN ASB-90-775 THAT LEON GARMON WAS *NOT GUILTY* OF MAKING FALSE ACCUSATIONS OF IMPROPRIETY AGAINST JUDGE SWANN IN OTHER RECUSAL MOTIONS AND *GUILTY* OF BEING DISRESPECTFUL TO JUDGE SWANN IN MAKING HIS ALLEGATIONS IN THOSE RECUSAL MOTIONS.

III.

WHETHER, DURING THE COURSE OF HIS REPRESENTATION OF A CLIENT, A LAWYER MUST INFORM THE CLIENT AND OBTAIN THE CLIENT'S PERMISSION PRIOR TO FILING A MOTION FOR RECUSAL OF THE JUDGE TO WHOM THE CLIENT'S CASE IS ASSIGNED AND WHETHER THE LAWYER'S FAILURE TO DO SO AMOUNTS TO A VIOLATION OF A DISCIPLINARY RULE.

IV.

VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE BAR, WHETHER THE FACTS IN ASB-90-775 SUPPORT A FINDING THAT LEON GARMON, IN MAKING AND FILING THE MOTIONS FOR JUDGE SWANN'S RECUSAL, VIOLATED ANY DISCIPLINARY RULE OF THE CODE OF PROFESSIONAL RESPONSIBILITY OF THE ALABAMA STATE BAR.

V.

WHETHER THE DISCIPLINARY BOARD PROPERLY APPLIED THE LAW TO THE FACTS IN REACHING ITS FINDINGS OF GUILTY IN ASB-90-775 AND IMPOSING DISCIPLINE ON THOSE FINDINGS.

VI.

WHETHER THE DISCIPLINARY BOARD PROPERLY APPLIED THE LAW TO THE FACTS IN REACHING ITS FINDINGS OF GUILTY IN ASB-90-632 AND IMPOSING DISCIPLINE ON THOSE FINDINGS.

VII.

WHETHER THE ALABAMA STATE BAR'S INTRODUCTION INTO EVIDENCE OF LEON GARMON'S "PRIOR DISCIPLINARY HISTORY," WHICH CONSISTED OF NOW-OUTLAWED "PRIVATE INFORMAL ADMONITIONS," PRIVATE REPRIMANDS IMPOSED BEFORE ADOPTION OF THE ALABAMA RULES OF DISCIPLINARY PROCEDURE, AND A PUBLIC CENSURE, ALL ARISING OUT OF CASES THAT ARE WHOLLY UNRELATED TO THE CHARGES IN ASB-90-632 AND ASB-90-775, IN AGGRAVATION AND ENHANCEMENT OF THE PUNISHMENT IN ASB-90-632 AND ASB-90-775 IS CONSISTENT WITH HIS RIGHTS TO A FAIR TRIAL.

VIII.

WHEN AN ATTORNEY ENGAGES IN CONDUCT BEFORE A JUDGE OR OTHER TRIBUNAL THAT RESULTS IN A CHARGE OF CONTEMPT OF COURT, WHETHER THE PUNISHMENT FOR THAT CONDUCT SHOULD BE METED OUT BY THE JUDICIARY, THROUGH THE CIVIL OR CRIMINAL CONTEMPT PROCEDURES, OR BY THE ALABAMA STATE BAR

THROUGH ITS ATTORNEY DISCIPLINARY PROCEDURE.

IX.

WHETHER THE PUNISHMENT IMPOSED AGAINST LEON GARMON IN THESE CASES IS CONSISTENT WITH HIS RIGHTS TO EQUAL PROTECTION AND DUE PROCESS OF THE LAW.

X.

WHETHER THE FINDINGS OF GUILTY IN ASB-90-775 ARE SUPPORTED BY "CLEAR AND CONVINCING" EVIDENCE.

XI.

WHETHER THE FINDINGS OF GUILTY IN ASB-90-632 ARE SUPPORTED BY "CLEAR AND CONVINCING" EVIDENCE.

* * *

B. MOTIONS FOR JUDGE SWANN'S RECUSAL

Each of the four motions for his recusal referred to by Judge Swann in his September 21, 1990, Bar grievance contained direct allegations of impropriety in specific instances and cases.

Each of the four motions urged Judge Swann's recusal because his continuing to sit in cases in which Leon Garmon appeared as counsel gave the appearance

of impropriety because of the long-standing and vituperative conflict between Leon Garmon and Judge Swann, which conflict would reasonably appear to impact on Judge Swann's ability to be impartial.

The motions recited that Judge Swann was a named defendant in CV-88-552, the lawsuit filed by Leon Garmon challenging the creation by the Administrative Office of Courts, at Judge Swann's personal urging, of the position of Domestic Referee in Etowah County. The motions also stated that Judge Swann was a named defendant in the federal civil rights action filed by Leon Garmon on behalf of Terry M. Alford CV-90-C-1089-M, *Alford v. Swann,* due to Judge Swann's actions in Mr. Alford's Etowah County criminal cases. Further, the motions set out Leon Garmon's intentions to file another civil rights action against Judge Swann, relative to the Domestic Referee's actions in a divorce case, *Tallant v. Tallant.* (C-1718-1775).

Finally, the recusal motions recounted the events in *State v. Alford,* in which Judge Swann held Leon Garmon in direct contempt of court and imprisoned him in the county jail for making an oral recusal motion. (*Id.*).

In addition to these allegations, in three of the recusal motions, DR-90-322-JSS, *Lister v. Lister* (C-1740-1762); DR-88-513.01, *Isbell v. Isbell* (C-1725-1739); and DR-27,529.02-JSS, *Farrow v. Farrow* (C-1763-1775), Leon Garmon made other allegations of impropriety, or situations that could reasonably give the appearance of impropriety, in support of Judge Swann's recusal. *See* Judge Swann's September 21, 1990, grievance at C-1854-1855.

The *Lister, Isbell* and *Farrow* recusal motions alleged that "Judge Swann has had ill-feelings toward Leon Garmon since Judge Swann testified as a character witness for Gadsden attorney Ludger D. Martin" in a legal malpractice lawsuit filed by Leon Garmon on behalf of a client in federal court.

In his recusal motions, Leon Garmon summarized Judge Swann's political activities since assuming the circuit court bench, including solicitations of votes and contributions for various county elected officials, including former Glencoe Mayor Ronnie O. Rampey.

The recusal motions alleged that Judge Swann, who was the trial judge for Mr. Rampey's *first* criminal trial, improperly allowed his political considerations influence his judicial decision to dismiss the criminal charges against Mr. Rampey.

Further, Leon Garmon alleged that Judge Swann's business and political activities and associations led him to grant summary judgment to Gregerson's Warehouse Groceries, owned by Peter V. Gregerson, in a malicious prosecution and false arrest lawsuit filed by Leon Garmon on behalf of a client. Peter V. Gregerson was a substantial political supporter of Judge Swann.

Judge Swann was accused of currying the favor of long-time Etowah County state representative Joe Mack Ford by ruling in Mr. Ford's divorce case, from his wife of some 20 years, in a way that was favorable to Mr. Ford. Judge Swann denied a motion for his recusal, filed by Gadsden attorney Jack W. Torbert on behalf of Mrs. Ford, in Mr. Ford's divorce case.

The recusal motions also alleged that Judge Swann had accepted campaign donations of money or in-kind services from H. Ray Cox, who was president of Alabama City Bank, knowing that those donations were from or paid for by bank funds. Mr. Cox was later convicted and sentenced to prison for embezzlement from Alabama City Bank.

In sum, the motions sought Judge Swann's recusal because:

> The foregoing actions by and between Judge Swann and Leon Garmon call into question Judge Swann's impartiality *in any case* in which Leon Garmon appears as an attorney before Judge Swann and may give rise to the appearance of impropriety in any such case over which Judge Swann presides in violation of Canon Two (2) of the Alabama Canons of Judicial Ethics.

(emphasis in original).

On September 17, 1991, the Bar filed formal disciplinary charges against Leon Garmon based upon Judge Swann's September 21, 1990, grievance. The Bar alleged that Leon Garmon's statements in and filing of the motions for recusal amounted to "conduct involving dishonesty, fraud, deceit, or misrepresentation [or] other willful misconduct"; that the motions were "prejudicial to the administration of justice"; that the motions amounted to "undignified or discourteous conduct that is degrading to a tribunal"; and that, in making the statements contained in the recusal motions, Leon Garmon "knowingly [made] false accusations against" Judge Swann. (C-7-11).

In his September 2, 1992, deposition, Judge Swann admitted his involvement as a judge in the *Rampey* criminal case, and the *Ford* divorce case, but denied any improper concerns influenced his decision. Judge Swann admitted he accepted contributions from Peter V. Gregerson and H. Ray Cox, but denied those contributions were illegal or had any impact upon his judicial actions. (*See* C-1965-2139).

In his deposition testimony, Judge Swann acknowledged the same set of facts and events that Leon Garmon claimed led to a feeling of personal animosity and discordance between Judge Swann and Leon Garmon (Swann depo. at 21-32, 45-47, 80-92, 95-97, 154-163 & generally; C-1965-2139), but Judge Swann specifically denied that any of those events caused him any hard feelings toward Leon Garmon, and certainly would not require his recusal from a case in which Leon Garmon was participating. (Swann depo. at 95-97, 145-147, 166-167, 168-171; C-1965-2139).

At the final hearing, the Bar offered and the Disciplinary Board accepted into evidence the formal disciplinary charges themselves against Leon Garmon, together with all exhibits the Bar appended thereto. (C-1858-1948), and read Judge Swann's September 2, 1992, deposition into the record at length. (C-696-713; 1965-2139).

At that final hearing, Leon Garmon testified that, at the time the motion for Judge Swann's recusal was made, he believed that the facts and circumstances, known to both he and Judge Swann, were such as would create an appearance of impropriety if Judge Swann continued to

sit. Leon Garmon testified that he had a good faith belief in the truth of his allegations against Judge Swann. (C-1005-1006).

Etowah County Circuit Judge Donald W. Stewart testified on behalf of Leon Garmon. (C-809-840, 1118-1134). Judge Stewart testified, in his opinion as a judge sitting on the same court as Judge Swann, that "any attorney who felt that the trier of fact might have some problem with the case then he has a duty to ask for recusal." (C-820). Further, Judge Stewart testified:

> . . . I would say the attorney has the obligation to the Court, not only to the client but to the Court to set out the reason [for seeking recusal]. Recusals aren't granted wholesale just because somebody wants a judge off a case, and the judge has an obligation to stay on that case unless [the motion] sets out a basis for recusal.

(C-821).

Judge Stewart testified that his opinion is a pleading or motion filed by Leon Garmon is supported by Leon Garmon's good faith belief an opinion that the matters set out in that document are true. (C-838). Judge Stewart testified that Judge Swann did not like Leon Garmon. (C-840).

Judge William W. Cardwell, Jr., who is Judge Swann's successor as presiding judge in the 16th Circuit, testified on behalf of Leon Garmon. (C-841). Judge Cardwell, who heard Judge Stewart's testimony, testified that he "would agree with everything [Judge Stewart] said one hundred percent." (C-841-842).

Judge Robert E. Lewis, the senior district court judge in Etowah County, testified that Leon Garmon always adequately represented his clients and that there was no problem with his professionalism. (C-843-850).

Judge Charles Wayne Owen, the other district court judge in Etowah County, echoed the testimony of Judge Lewis, and testified that Leon Garmon set a "good standard for an attorney's good reputation in this community." (C-851). Leon Garmon has never engaged in any undignified or discourteous conduct in Judge Owen's court. (C-851-852).

Testifying by affidavit on behalf of Leon Garmon, former long-time senior assistant general counsel for the Bar, John A. Yung, IV[18], stated that:

> For a period of ten and one-half (10 1/2) years, from 1980 to 1991, I was an assistant general counsel for the Alabama State Bar. A substantial part of my duties as assistant general counsel was to review disciplinary complaints against attorneys and make recommendations, on behalf of the Bar, to the Disciplinary Commission as to disposition of those complaints. . . .
>
> During the course of my ten and one-half (10 1/2) years' employment as assistant general counsel of the Alabama State Bar, I reviewed hundreds of complaints or grievances against Alabama lawyers. I acted as prosecutor for the

---

[18] Mr. Yung testified by affidavit instead of appearing in-person due to a "schedule conflict on [the dates of the final hearing] and I cannot be present in Gadsden to testify personally." (C-898-904).

> Alabama Bar against lawyers whose conduct resulted in filing of formal disciplinary charges in many cases. . . .
>
> My opinion is that a motion to recuse may necessarily contain matters that may be offensive or upsetting to the judge who is the subject of that motion. Barring a full hearing, the only practical way that denial of a motion to recuse can be successfully preserved for appeal is to set out in the motion to recuse all the grounds and factual averments supporting the judge's recusal. *My opinion is that such allegations, while they may be offensive to the judge's sensibilities,* if made with the good faith and reasonable belief that they were true, do not amount to unethical conduct. . . .

(C-898-904, 2140-2143).[19]

Montgomery attorney Allen Windsor Howell testified as an expert witness on behalf of Leon Garmon. (R-584). Mr. Howell testified that a lawyer has a duty to zealously represent his client and that if a motion should be filed and is not filed then the attorney is guilty of failing to zealously represent that client. (C-1250-1251).

In Mr. Howell's direct testimony the following transpired:

> Q [by Mr. McPhillips]. . . . Given what Mr. Garmon said in his motion to recuse which was

---

[19] Jesus grievously offended the sensibilities of the religious and governmental leaders of his day by physically ejecting the moneychangers from the temple. For his affrontry, Jesus knew he would incur the wrath of the law-givers. *See Matthew 21:12, Mark 11:15* (King James Version).

in the nature of a brief about why he felt [Judge Swann's] politics were adverse to him and particularly to his client, do you feel it was relevant and appropriate for him to set that forth in a motion to recuse.

A [by Mr. Howell]. Yes.

Q. Do you think he would have been remiss in his duties and obligations to his client if he had not set forth what he did in his motion to recuse believing as he had previously testified that he had stated it with good faith and in a reasonable basis for believing it was true?

A. I don't know about remiss, but like I said, I might have put less. I've seen motions to recuse that stated almost no grounds, and you know, that's an area where people differ. Without knowing the whole history, I don't know if I would have done it exactly as he did it or not, but I can't argue with the way he did it. . . .

Q. Mr. Howell, do you believe that Mr. Garmon fell below any kind of legal standard of care in filing this motion for recusal . . . in good faith with a reasonable basis for believing it was true that he's previously testified to?

A. No. In fact, my own practice at least is to file the motion unless the client tells me not to.

(C-1258-1260).

Birmingham lawyer Robert Ford, a member of the law firm of Emond & Vines, testified on behalf of Leon Garmon. (C-1268-1269). Mr. Ford testified that, assuming the matters stated by Leon Garmon in his recusal motions were made with "good faith reasons for believing they

were factual," the recusal motions did not violate any standard of care or conduct expected of an attorney in the same or similar circumstances. (C-1274-1277).

Of these charges, Leon Garmon was found *not guilty* of having "knowingly [made] *false accusations* against" Judge Swann. (C-11, 2352-2353) (emphasis added). Leon Garmon was found guilty of the four remaining charges (C-7-11, 2352-2353). On these findings of guilty, the Disciplinary Board set Leon Garmon's punishment *originally at 30 days* which was *increased to 45 days* suspension from the practice of law when the Bar stated *this was the "minimum"*. (C-2352-2353).

C. JUDGE SWANN'S SEPTEMBER 2, 1992, DEPOSITION AS IT RELATES TO THE MOTIONS FOR RECUSAL

On Wednesday, September 2, 1992, Leon Garmon, who was represented therein and continues to be represented by Julian McPhillips of Montgomery, obtained the oral deposition of Judge Swann in ASB-90-775.[20]

In that deposition, Mr. McPhillips questioned Judge Swann regarding the prior actions commenced by Leon Garmon against Judge Swann (particularly the federal court action before Judge Clemon, *supra*) and the "Domestic Referee," Ronald Higgins. Although Judge Swann denied any "animosity" toward Leon Garmon for

---

[20] Judge Swann's deposition is contained in the record at C-1965-2139.

those actions, Judge Swann was concerned that such allegations of impropriety had been made against him by Leon Garmon, and *only* by Leon Garmon.

Judge Swann disputed and emphatically denied any wrongdoing, or even the appearance of any impropriety, that would necessitate his recusal in any case involving Leon Garmon because, to recuse himself would, in Judge Swann's words, give "credibility or credence to what Mr. Garmon says." Swann depo. at 120.[21]

In his recusal motions to Judge Swann in the four divorce cases, as must be done in a [sic] such a motion, Leon Garmon alleged that Judge Swann had or may appear to have some "personal, extrajudicial bias" that may influence his decisions. Leon Garmon alleged that Judge Swann had shown favoritism in a divorce for a local legislator, Joe Mack Ford, who had substantial influence in obtaining the Legislature's approval for a county judicial pay supplement to make Etowah County's judges among the highest paid in the state. Supporting facts were stated in Leon Garmon's allegations regarding the Ford divorce. (Swann Depo. at 50-69). Judge Swann supported Mr. Ford's pay supplement bill. (Swann Depo. at 69).

Leon Garmon also alleged, with supporting facts from which an inference of impropriety could be made and which clearly gave the appearance of impropriety,

---

[21] In that same deposition, when asked whether Leon Garmon's allegations might have some merit and whether someone other than Leon Garmon might be lying, Judge Swann testified that "I'm not going to say that I think somebody is lying under oath." (Swann Depo. at 110).

that Judge Swann had dismissed certain criminal felony charges against the popular then-Mayor of the City of Glencoe, Ronnie O. Rampey, in politically "hot" case, in order to obtain the continued support of Mr. Rampey and his myriad followers. (Swann Depo. at 37-49). *See* orders, etc., in *State v. Rampey* (C-1780-1791).

Judge Swann testified as a character witness for Ludger D. Martin, the then-Alabama State Bar commissioners for Etowah County, against whom Leon Garmon had filed a legal malpractice action in federal court. (Swann Depo. 24-37).

Also, Leon Garmon claimed that Judge Swann, as an elected circuit judge, had, in other cases involving "politically important" persons who had supported him in his political campaigns, ruled in favor of those persons simply because of the political benefit to himself. Particularly, in a false arrest and malicious prosecution case in which Leon Garmon, on behalf of a client, sued Peter Gregerson, a well-known and influential businessman in Etowah County, Judge Swann first denied Leon Garmon's motion for his recusal and, then, granted summary judgment to the Gregersons, shortly before he stood for re-election.

In his deposition, Judge Swann acknowledged that the Gregersons had contributed money and in-kind supplies for his re-election campaign. Judge Swann vehemently denied any impropriety in denying the motion for recusal and denied any political motivation for his granting summary judgment. Instead, Judge Swann attacked Leon Garmon:

> The motion [for recusal] that Mr. Garmon made was defamatory if anything else to the Court. And that in effect that the Court had accepted largess and as a result I would rule so and so. . . .
>
> Q. [by Mr. McPhillips]. If you considered his motion for recusal then to be defamatory, you must have not felt very well toward Mr. Garmon for that, for defaming you? You are human, aren't you?
>
> A. [T]he motion for recusal was . . . unprofessional. . . . The tenor of the motion is that the Court favors could be bought or influenced by political support.

(Swann Depo. at 88, 90). After the election, Judge Swann *sua sponte* set aside his summary judgment to the Gregersons, but *finally did recuse himself.* Judge Swann testified:

> . . . The tenor is that the Court's influence could be purchased is the basis of my entry of my order of recusal. . . . [M]y whole basis is on the tenor of the motion itself. . . . The inferences that I drew [were] that because these people [the Gregersons] supported me that they could purchase my judicial integrity.

(Swann Depo. at 91).

Judge Swann belatedly recused himself in the Gregerson case because:

> . . . I thought that just the implication of the motion itself was such that I should recuse myself. That my honor had been impugned and I didn't want that to become the issue rather than the litigation between the clients. . . .

> [The appearance of impropriety] is something [a judge] ought to avoid. But I think that the rules are that he must make up his own mind, and *the appearances of impropriety are simply not enough for a judge to recuse himself.* . . .
>
> . . . [T]he issues of the trial as far as being fair to both the plaintiff and the defendant would best be served by my withdrawing from the case. That was a judgment call on my own.

(Swann Depo. at 93-94). Judge Swann acknowledged that, in Etowah County, "[i]t's rare that anyone files a motion for a judge to recuse himself." (Swann Depo. at 97).

When Judge Swann got a "rash of these" recusal motions from Leon Garmon, alleging essentially the same matters as in the Gregerson case (*e.g.*, impropriety as a result of political influences, appearance of impropriety), Judge Swann held Leon Garmon in contempt and ordered him to jail (in the Alford case) and filed a complaint against Leon Garmon with the Alabama State Bar (in ASB-90-527 and ASB-90-775). (Swann Depo. at 96).

As to the bases for Judge Swann's filing those Bar complaints against Leon Garmon for the recusal motions, Mr. McPhillips asked Judge Swann:

> Q. Now, if you weren't already predisposed or prejudiced against Mr. Garmon before he filed the motions on the grounds of the reasons set forth in his motion after he filed this motion, you certainly had some ill feelings toward him?
>
> A. . . . I had no bias against Leon. I felt he had been unprofessional and I so expressed myself.

(Swann Depo. at 145). Asked whether he had "pretty deep feelings of dislike towards Mr. Garmon," Judge Swann stated that "I fell like a member of our Bar has acted very unprofessionally. . . . It's not a personality issue." (Swann Depo. at 147). Judge Swann was equally unresponsive when asked whether the recusal motions "irritated" him personally. (Swann Depo. at 131).

As to the recusal motions themselves, Mr. McPhillips asked:

> Q. You don't think he [Leon Garmon] was trying to file motions to get you off of the case in which he deemed to be in the best interest of his client not to have you on a case with him?
>
> A. The reasons that he put forth in most of the motions would have no relevance for that. It had no bearing. Therefore, I felt that the thrust and intent of the motions was ill founded.
>
> Q. You have already postulated now you felt offended by some of the language in the motion. But my point to you is, don't you believe these motions were basically . . . his position on why you ought not to be setting [sic] on cases involving him?
>
> A. I think the Code requires a little bit more. That if you were going to sign your name to some pleadings, that they are in good faith and that they have some relation to facts.

(Swann Depo. at 151-152).

Because he filed the recusal motions, Judge Swann thought Leon Garmon to be "delusional" and suffering from "paranoia" (Swann Depo. at 153-154); that Leon Garmon engaged in "bizarre behavior" that was "ever

more threatening and erratic." (Swann Depo. at 158). Indeed, although admittedly *based on hearsay* as to Leon Garmon's actions, Judge Swann feared "Garmon is losing his struggle for control of his actions." (Swann Depo. at 158).

D. FILLING MOTION FOR JUDGE SWANN'S RECUSAL WITHOUT FIRST OBTAINING THE CONSENT OF THE CLIENT

In addition to the charges relating [sic] Judge Swann, the Bar's formal disciplinary complaint charged that Leon Garmon had violated a disciplinary rule by filing a motion for Judge Swann's recusal in *Farrow v. Farrow* without first obtaining the consent of his client, Janie Farrow, to the filing of that motion. (C-7-11).

At a limited hearing conducted by Judge Swann on October 3, 1990, Janie Farrow testified that she did not authorize or direct Leon Garmon to file a motion for Judge Swann's recusal and that she was not aware that such a motion had been filed until her ex-husband told her. (C-34-40).

At the final hearing in these cases, Leon Garmon testified that Janie Farrow was informed of the motion for Judge Swann's recusal prior to its being filed. (C-1007-1012). Dr. Pascual Herrera, who was Mrs. Farrow's employer at the time the motion was filed, testified that, after an article appeared in the *Gadsden Times* about Judge Swann's putting Leon Garmon in jail, Mrs. Farrow had expressed to him her concern about Judge Swann sitting on her divorce modification case. (C-714-750). Dr. Herrera spoke with Harriet Garmon, Leon Garmon's

office manager and wife, about Mrs. Farrow's concerns, and then told Mrs. Farrow that Leon Garmon could file a motion asking Judge Swann to step aside. Mrs. Farrow did not object to that prospect, and she never complained to Dr. Herrera after the motion was filed.

At the final hearing in this case on October 1 and October 2, 1992, Mrs. Farrow *was not called as a witness* by the Bar and *did not testify* in-person before the Disciplinary Board.[22] Because of her absence, the Disciplinary Board was unable to observe her demeanor or judge the weight and credibility of her testimony, and Leon Garmon was unable to cross-examine Mrs. Farrow.

At the final hearing, the Bar continued to insist that filing such a motion without the client's consent amounted to a disciplinary violation. (R-92-93). Because of the way the charges in this case are framed, however, it is impossible to tell whether the Disciplinary Board found this conduct to be a violation of the disciplinary rules of the Code of Professional Responsibility.

---

[22] At a "hearing" held by Judge Swann on October 3, 1990, ostensibly to determine whether Mr. Garmon had obtained the consent of Mrs. Farrow prior to filing the recusal motion, Judge Swann conducted the examination of Mrs. Farrow and would not permit Mr. Garmon to cross-examine Mrs. Farrow or to call witnesses to rebut or impeach Mrs. Farrow's statements (C-81-91).

III. ASB-90-632: COMPLAINT OF ATTORNEY KENNETH P. ROBERTSON, JR., REGARDING COMMUNICATION WITH BILLY, JOYCE & JOYCE MARIE FANCHIER

Leon Garmon represented Billy Fanchier, his wife Joyce Fanchier, and their daughter Joyce Marie Fanchier in a products liability lawsuit against General Motors Corporation arising from an automobile accident in which Joyce Marie Fanchier was injured. (C-1346-1356, 2226-2239). Trial of that lawsuit resulted in the verdict in favor of General Motors Corporation and against the Fanchiers.

Thereafter, without telling Leon Garmon that they discharged him as their attorney (C-1390-1443), the Fanchiers saw Gadsden attorney Kenneth P. Robertson, Jr. On June 28, 1990, Mr. Robertson wrote a letter to Leon Garmon, which was signed by all three of the Fanchiers, accusing him of having committed legal malpractice in the preparation and trial of the Fanchiers' case against General Motors, and stating Mr. Robertson's intention to sue Leon Garmon on behalf of the Fanchiers for that malpractice. (C-2226-2239).

Kenneth P. Robertson, Jr., was employed as a law clerk by Leon Garmon while he finished law school at the Birmingham School of Law and during his five attempts to pass the Alabama State Bar examination. (C-1390-1443). After he finally passed the Bar exam on his fifth attempt, Mr. Robertson demanded certain employment concessions from Leon Garmon. Those concessions were refused and, in combination with other circumstances, led Leon Garmon to terminate Mr. Robertson's

employment in early October 1990. After his termination, a series of conflicts, both in court and out, erupted between Mr. Robertson and Leon Garmon.

On July 18, 1990, Leon Garmon wrote a letter to Gadsden lawyer Greg Cusimano, who represented one of the defendant parties in the products liability case, requesting copies of certain documents in order to respond to Mr. Robertson's letter. Leon Garmon sent a copy of that letter directly to Billy Fanchier. (*See* C-2226-2239).

In response to the copy of Leon Garmon's letter to Billy Fanchier, on July 23, 1990, Mr. Robertson wrote Leon Garmon "advising [him] to have no further communication with my clients, Billy Fanchier, Joyce Fanchier and Joyce Marie Fanchier." Mr. Robertson wrote that if further correspondence from Leon Garmon was sent to the Fanchiers, he had been "instructed to file a grievance with the Alabama State Bar regarding [Leon Garmon's] intentional violation of Canon DR-7-104(A)(1) [*sic*]." (*See Id.*).

On July 27, 1990, Leon Garmon wrote a five-page letter to Mr. Robertson in which he denied having committed any legal malpractice in the Fanchiers' case. The letter also recounted Mr. Robertson's own ethical violations in connection with a case in which Mr. Robertson testified against Leon Garmon's clients, Larry Richards and his wife, about matters Mr. Robertson learned while he was employed by Leon Garmon. This case is reported as *Richards v. Lennox Industries, Inc.*, 574 So.2d 736 (Ala. 1990), in which this Court reversed the trial court's judgment in favor of Lennox and against the Richards *because* of Mr. Robertson's illegal testimony. *See* 574 So.2d at

740-741. The Alabama State Bar has taken no public disciplinary action against Mr. Robertson for his violation of the disciplinary rules of the Alabama Code of professional Responsibility, which said violation was explicitly and expressly found by this Court in its opinion in *Richards,* for his illegally testifying in the trial of the *Richards* case.

Enclosed with that letter were fourteen groups of documents in direct rebuttal to Mr. Robertson's allegations of legal malpractice. (C-2226-2239).[23]

A copy of Leon Garmon's July 27, 1990, letter was sent to Billy Fanchier, *as well as to J. Anthony McLain,* the assistant General Counsel of the Bar.

On June 19, 1992, the Bar filed formal charges against Leon Garmon in connection with his communication with the Fanchiers. (*Id.*). The charges were based upon an earlier grievance filed by Mr. Robertson. In the formal charges, the Bar alleged that, not only did Leon Garmon communicate with the Fanchiers after having been informed that they were represented by another lawyer, but that in his July 27, 1990, letter to Mr. Robertson, Leon Garmon "attacked the character" of Mr. Robertson. Specifically, the Bar charged that Leon Garmon violated DR-7-104(A)(1) by communicating with the Fanchiers knowing them to be represented by another lawyer in the same matter, and that this action "reflects adversely" on

---

[23] Significantly, Mr. Robertson never filed a legal malpractice lawsuit against Leon Garmon on behalf of the Fanchiers. The statute of limitations for such an action has now expired.

Leon Garmon's fitness to practice law in violation of DR-1-102(A)(6).

At the final hearing, the Bar offered and the Disciplinary Board accepted into evidence the *formal disciplinary charges themselves* against Leon Garmon, together with all exhibits the Bar appended thereto. (C-1346-1347).

At the final hearing in this case, Leon Garmon testified that, at the time he sent copies of these letters to the Fanchiers, he still considered the Fanchiers to be his clients. (C-1437-1438). Leon Garmon testified that he sent a copy of the July 27, 1990, letter to the Bar because he "wanted the State Bar to know that I did not feel at that time nor at this time that I was doing anything wrong. I had nothing to hide and wanted the State Bar to know about it." (C-1440-1441).

The Disciplinary Board found Leon Garmon guilty of violating DR-7-104(A)(1), but not guilty of violating DR-1-102(A)(6). (C-796. *See Appendix I*). For punishment on its findings of guilty, the Disciplinary Board imposed a public reprimand of Leon Garmon without general circulation. (C-1669. *See Appendix I*).

IV. EVIDENCE ON THE ISSUE OF DISCIPLINE

At the punishment-phase hearing in the bifurcated attorney disciplinary proceedings against Leon Garmon in this case, the Bar offered into evidence, as "Bar Exhibit 1," Leon Garmon's "disciplinary history" with the Alabama State Bar. (C-2245-2256). That "disciplinary history" consisted of the following items:

(1) A June 7, 1990, "public censure" in case number ASB-88-76;

(2) An April 30, 1984, "private informal admonition" in ASB-84-73[24];

* * *

---

[24] "Private informal admonitions" were *abolished* with the adoption on January 1, 1991, of the Alabama Rules of Disciplinary Procedure. "Private informal admonitions" were permitted as attorney discipline under the older Alabama Rules of Disciplinary Enforcement. If the Bar determined to impose a "private informal

NOTICE: This opinion is subject to formal revision before publication in the advance sheets of *Southern Reporter.* Readers are requested to notify the Reporter of Decisions, Alabama Appellate Courts, 445 Dexter Avenue, Montgomery, Alabama 36130 ((205) 242-4621), of any typographical or other errors, in order that corrections may be made before the opinion is printed in *Southern Reporter.*

SUPREME COURT OF ALABAMA

OCTOBER TERM, 1990-91

1900644

Ex parte Leon Garmon

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS

(Re: Leon Garmon

v.

State)

(Etowah Circuit Court, CC-88-382.01 and 382.02)

PER CURIAM.

Leon Garmon, a lawyer, represented Terry Alford in a felony criminal case. Terry Alford's case went to trial on June 11, 1990. In a pre-trial motion to recuse, Garmon suggested that the trial court was biased against Terry Alford and that the trial court had conspired to violate Terry Alford's civil rights. The trial court denied the motion to recuse. On June 13, 1990, when the jury retired

to deliberate on its verdict in that case, the trial court held Garmon in-direct contempt of court for his remarks made during the pre-trial motion to recuse and sentenced him to serve six hours in jail. Still on June 13, after the jury had returned a verdict of not guilty in Alford's case, Garmon was incarcerated for two and one-half hours for that direct contempt; then he posted bond and was released. The Court of Criminal Appeals affirmed the trial court's judgment.

Section 12-1-8, Ala. Code 1975, provides when courts may inflict summary punishment[1] for contempt, and it provides in pertinent part:

> "The powers of the several courts in this state to issue attachments and inflict summary punishment for contempts shall not extend to any other cases than:
>
> > "(1) Disrespectful, contemptuous or insolent behavior in court, tending in any way to diminish or impair the respect due to judicial tribunals or to interrupt the due course of trial;"

Concerning direct contempt, we have recently stated:

> "Direct contempts are those committed in the judge's presence, where all of the essential elements of the contempt are under the eye of the court, and are actually observed by the

---

[1] "Summary" punishment does not refer to the timing of the punishment, but, rather to imposition of punishment without the formal procedures normally involved with criminal actions. See Rychlak, *Direct Criminal Contempt and the Trial Attorney: Constitutional Limitations on the Contempt Power* 14:2 American Journal of Trial Advocacy 243 (1990).

> court. In a direct contempt case, the judge can summarily and instantaneously find the person to be in contempt."

State v. Thomas, 550 So.2d 1067, 1072 (Ala. 1989).[2]

Garmon argues that the judgment of the Court of Criminal Appeals is due to be reversed on two grounds: 1) that the substance of his remarks was not contemptuous and 2) that the delay between his remarks and the trial court's holding of direct contempt rendered a finding of direct contempt inappropriate in this case. As to Garmon's first ground, although we do not so hold, because we resolve the case based on Garmon's second allegation of error, after reviewing the particular facts of this case we would be inclined to hold that the substance of Garmon's numerous, unsubstantiated claims made against the trial court, which observed his demeanor while he made those claims, could properly subject Garmon to summary punishment for direct contempt.[3]

---

[2] The law of contempt is now generally set out in Rule 33, Ala. R. Crim. P., effective January 1, 1991.

[3] Garmon made the following remarks:

> "The purpose of the motion I'm now about to put before the Court is that on behalf of Mr. Alford there is no way that we feel that the Court can be in a position to try this case for several reasons: first of all, the pending civil suit in Federal court is still pending. Second, we would expect and would proffer and tell the Court that one of our defenses – as a part of our defense [is] going to be that this is a case that was disposed of and that part of our defense is going to be, we expect to show . . . that this is a politically motivated and politically induced situation where Mr. Alford's employment as shop manager, shop fore-

As to Garmon's argument that the time lapse between his remarks and the trial court's holding of

---

man for the former County Commissioner Mr. Wendell Bryant, that after Mr. Bryant was defeated by the incumbent, the man that now presently is holding that office, Mr. Bull Smith, . . . made some statements to Mr. Alford that he did not want him running his shop anymore. . . .

". . . .

" . . . Mr. Alford, we would also expect the testimony to show, is going to testify that Mr. Bull Smith has told him on several occasions that he does not want a whistleblower or someone like him in his employment and that as a result of that we have our hearing – and that's Defendant's Exhibit 7 – and the agreement that I would expect to call His Honor as a witness in this case along with Mr. Pitts [the assistant district attorney], if necessary, to show that the agreement was made and it speaks for itself, and, of course, the court order [that] was entered as a result of that speaks for itself but that after that motion was filed by me to have the case dismissed . . . that there was a meeting between His Honor and Mr. Bull Smith in which Mr. Bull Smith convinced the Court that this case should not be dismissed.

". . . .

" . . . We will show that change of the mind took place after a meeting between Mr. Bull Smith and representatives of Mr. Bull Smith with the Court and that this ex parte or outside meeting resulted in the Court informing me that my motion was not well taken, that you had, quote, changed your mind. So, from our standpoint there is no way that this Court and this Judge can sit and hear this case based on facts and evidence as we expect to present them. . . .

". . . .

" . . . And we're making this offer most of which is a matter of written records and documents but we

direct contempt rendered direct contempt inappropriate, we note that in certain circumstances, particularly where the offender is a lawyer representing a client on trial, the summary punishment associated with direct contempt can properly be postponed until the conclusion of the proceedings. *Taylor v. Hayes,* 418 U.S. 488, 498 (1974).

However, as the United States Supreme Court also noted in *Taylor,* at 497, "the usual justification of necessity [for summary punishment] . . . is not nearly so cogent when final adjudication and sentence are postponed until after trial." Furthermore, although the allegedly contemptuous behavior occurred on June 11, the trial court did not, until June 13, give Garmon any notice that it had determined that he was in direct contempt and thereby subject to summary punishment. As *Taylor* says, "where punishment and conviction [for direct contempt] are

---

would expect to call the Court and call Mr. Bull Smith as witnesses – factual witnesses based on facts and circumstances that happened to show that this case has no basis or no merit but that only that even after there was an agreement that the case would be dismissed that the continuation of the case was only after we had some ex parte communications that resulted in this case being put back on the docket and . . . we . . . [n]ow tell the Court that we just do not see any way that this Court can sit and hear this case and act as a trial judge at the same time that a Federal civil rights suit is pending on behalf of Mr. Alford against this Court and the district attorney in their official capacities, not individual capacities, but in their official capacities as the district attorney and as the circuit judge before whom this case is assigned and, further for the reasons that the Court would be called upon as a factual witness."

delayed, 'it is much more difficult to argue that action without notice of hearing of any kind is necessary to preserve order and enable [the court] to proceed with its business.' " 418 U.S. at 498. This Court has stated, "Summary procedures, designed to punish direct contempts, are utilized to fill the need for immediate penal vindication of the dignity of the court." *In re Tarpley*, 293 Ala. 137, 142, 300 So.2d 409 (1974).

Under the facts of this case, considering not only the time lapse between Garmon's allegedly contemptuous conduct and the trial court's holding of direct contempt but also the trial court's complete failure over that time to notify Garmon of its determination that he was in direct contempt of court, we hold that the Court of Criminal Appeals erred in affirming the trial court's judgment of direct contempt. The judgment is due to be reversed and a judgment rendered in favor of the defendant.

REVERSED AND JUDGMENT RENDERED.

Maddox, Houston, Steagall, Kennedy, and Ingram, JJ., concur.

Adams, J., concurs in the result.

Gadsden Times, Tuesday, April 7, 1992 – B3

Lawyer pleads guilty to tax charge

Associated Press

BIRMINGHAM – Former state bar association president Gary Huckaby was sentenced to two months of home detention and fined $20,000 for failing to file federal income tax returns for 1988, when he led the lawyers' organization.

Huckaby, 53, a partner in the Huntsville office of the Birmingham law firm Bradley, Arant, Rose & White, also was ordered to serve two years on probation.

U.S. District Judge Sam C. Pointer imposed the sentence following Huckaby's guilty plea Friday to the misdemeanor charge under an agreement with prosecutors. Huckaby acknowledged to the court that his income exceeded $200,000 in 1988 and he knowingly failed to file his tax return by the April 15, 1989 deadline.

Federal prosecutors said Huckaby paid his 1988 taxes on Oct. 15, 1991, and that he filed returns and paid delinquent taxes for the tax years 1985 through 1987 in December 1989. His total payment for back taxes, plus penalties and interest for the four years was more than $120,000, according to Assistant U.S. Attorney Michael Whisonant.

Huckaby, who declined comment, was president of the Alabama State Bar in 1988-89.

Reggie Hamner, the executive director of the association in Montgomery, said Monday he could not comment

on whether or not the bar would review the misdemeanor tax case for possible disciplinary action. The bar has authority to discipline attorneys who violate codes of conduct, subject to Alabama Supreme Court review.

Internal Revenue Service officials said Huckaby paid his back taxes only after the IRS began investigating.

Drew Redden, an attorney for Huckaby, told the court prior to sentencing that the government has suffered no tax loss. "What has been paid is more than the tax that would have been due," he said.

UNITED STATES DISTRICT COURT
Northern District of Alabama

UNITED STATES OF AMERICA
v.
GARY CARLTON HUCKABY
Defendant.

Case Number
CR: 92-P-39-NE

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

(Filed Apr. 3, 1992)

The defendant, GARY CARLTON HUCKABY, was represented by Drew Redden.

The defendant pleaded guilty to count(s) 1. Accordingly, the defendant is adjudged guilty of such count(s), involving the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
26 USC 7203	Failure to File Income Tax Return	08/15/89	1

As pronounced on 04/03/92, the defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the Clerk, U.S. District Court a special assessment of $25.00, for count(s) 1, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days

of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 3rd day of April, 1992.

/s/ Sam C. Pointer, Jr.
United States District Judge

Defendant's SSAN: 423-46-3264
Defendant's Date of Birth: 07/12/38
Defendant's address: 701 Greene Street; Huntsville, AL 35801

PROBATION

The defendant is hereby placed on probation for a term of 2 year(s).

While on probation, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

1. If this judgment imposes a fine, special assessment, costs or restitution obligation, it shall be a condition of probation that the defendant pay any such fine, assessment, costs and restitution.

2. The defendant shall not own or possess a firearm or destructive device.

3. The defendant shall serve two months at home detention which may include electronic monitoring as deemed necessary by the U.S. Probation Office.

STANDARD CONDITIONS OF PROBATION

While the defendant is on probation pursuant to this Judgment:

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.

2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4) The defendant shall support his or her dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate

with any person convicted of a felony unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

FINE

The defendant shall pay a fine of $20,000.00.

This fine (plus any interest required) shall be paid at the rate of $833.00 per month for 23 months and $841 for the 24th month, unless modified by the U.S. Probation Office for good cause shown.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report

Guideline Range Determined by the Court:

Total Offense Level:	10
Criminal History Category:	1
Imprisonment Range:	6 months to 12 months
Supervised Release Range:	1 year
Fine Range:	$ 2,000 to $ 20,000
Restitution:	$ -0-

The Court departs from the Guidelines as they relate to the imprisonment range because there are circumstances in this case not contemplated by the Guidelines. Specifically, the filing of returns and payment of taxes result in a higher offense level than if the returns had not been filed and the defendant had been denied the reduction for acceptance of responsibility. For purposes of the imprisonment range (but not for the fine range) the Court finds that the offense level should be treated as 8, which produces an imprisonment range of 2 to 8 months.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA)
)
VS.)
)
GARY C. HUCKABY)

PLEA AGREEMENT

(Filed Apr. 2, 1992)

The United States of America (hereinafter, "Government") and Gary C. Huckaby (hereinafter, "defendant") hereby agree to the following terms and understandings:

1. The defendant agrees to plead guilty to a ONE COUNT INFORMATION which charges the defendant with violating Title 26, United States Code, Section 7203 (Willful failure to file return, supply information or pay tax for the tax year 1988).

2. By pleading guilty to this charge, the defendant could receive a MAXIMUM SENTENCE of ONE YEAR INCARCERATION AND/OR A FINE OF $100,000.

3. The Government agrees, pursuant to Federal Rule of Criminal Procedure, 11(e)(1)(B), that it will not oppose the defendant's request for either a sentence of probation or a period of home detention pursuant to Section 5C1.1(c)(2) of the *Federal Sentencing Guidelines Manual,* should the Court deem such a punishment appropriate under the Sentencing Guidelines. The government will recommend and the defendant agrees to pay a fine of fifty thousand dollars ($50,000.00).

4. The Government stipulates that the defendant has clearly demonstrated a recognition and affirmative acceptance of personal responsibility for his conduct.

5. The Government and the defendant further agree and stipulate to the following terms and understandings:

a. All taxes, penalties and interest due and owing to the Internal Revenue Service for the tax years 1985, 1986, 1987 and 1988 have been paid.

b. The following charges shall NOT be brought against the defendant: Any violation of Title 26, United States Code, §7201 and/or 7206 for 1988 or any earlier year; any violation of Title 26, United States Code §7203 for any earlier tax year other than 1988.

c. Because it is the Court's duty to impose sentence upon the defendant, any sentence either recommended or stipulated to herein IS NOT BINDING UPON THE COURT, and the Court need not accept the recommendation, but may instead sentence the defendant as outlined in Paragraph 2. In the event the Court does not accept the Government's recommendation, the defendant fully understands that he may not unilaterally withdraw his plea.

d. Unless this plea is rejected by the Court or otherwise withdrawn, the defendant hereby waives and gives up any and all motions, defenses, objections, or requests which he has made or raised, or could assert hereafter, to the Court's entry of judgment against him and imposition of sentence upon him consistent with this Agreement. The defendant further waives and gives up the right to

appeal or collateral attack based upon any of the above stated provisions.

6. The Government stipulates that with regard to sentencing by the Court the defendant may argue:

a. There is no "tax loss" to the Government,

b. Two of the tax years in question should not be considered in determining an offense level under the United States sentencing Guidelines;

c. The "alternative measure" of tax loss provided by U.S.S.G. §2TI.1 should be employed; and

d. mitigating circumstances and conduct exist which permit the Court to depart from the guideline-specified sentence.

The defendant agrees and understands that the Government will argue contrary to the defendant's position as stated in paragraphs 6 (a)-(c) herein, and that with regard to paragraph 6 (d), the Government reserves the right to full allocution on the facts, including correcting any perceived misstatements of fact or to provide additional factual information in order that the Court will have a complete understanding of the facts. Additionally, the Government reserves the right to rebut any argument as to whether sufficient grounds exist for a downward departure under the Sentencing Guidelines.

Defendant's Understanding

I have read and understand the provisions of this Agreement. I have discussed the case and my constitutional and other rights with my lawyer. I am satisfied

with my lawyer's representation in this case. I understand that by pleading guilty, I will be waiving and giving up my right to continue to plead not guilty, to a trial by jury, to the assistance of counsel at that trial, to confront, cross-examine, or compel the attendance of witnesses, to present evidence in my behalf, my privilege against self-incrimination, and the presumption of innocence. I agree to enter my plea as indicated above on the terms and conditions set forth herein. NO OTHER PROMISES OR REPRESENTATIONS HAVE BEEN MADE TO ME BY THE PROSECUTOR, OR BY ANYONE ELSE, NOR HAVE ANY THREATS BEEN MADE OR FORCE USED TO INDUCE ME TO PLEAD GUILTY. I further state that I have not had any drugs, medication, or alcohol within the past 48 hours.

I understand that the Government may withdraw its consent to this Agreement at any time prior to its acceptance in writing by me as evidenced by my signature on this Plea Agreement and its delivery to the prosecuting attorney even though I may not personally have received notice of the withdrawal of consent by the Government.

I have personally and voluntarily placed my initials on every page of this Agreement and have signed the signature line below to indicate that I have read and approved all of the previous paragraphs of this Agreement, and understand all of the provisions of this Agreement, both individually and as a total binding Agreement.

1-10-92
Date

/s/ Gary C. Huckaby
Gary C. Huckaby, Defendant

Counsel's Understanding

I have discussed this case with my client in detail and have advised him of his rights and all possible defenses. My client has conveyed to me that he understands this Agreement and consents to all its terms. I believe the plea and disposition set forth herein are appropriate under the facts of this case and are in accord with my best judgment. I concur in the entry of the plea as indicated above and on the terms and conditions set forth herein.

1-16-92
Date

/s/ L. Drew Redden by Illegible
L. Drew Redden
Counsel for Defendant

I have reviewed this matter and concur that the plea and disposition set forth herein are appropriate and are in the interest of justice.

2/28/92
Date

/s/ Frank W. Donaldson
FRANK W. DONALDSON
United States Attorney
Northern District of Alabama

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

UNITED STATES OF AMERICA	)	
	)	CR. NO.
v.	)	CR92-P-039-NE
/s/ Gary C Huckaby,	)	
DEFENDANT.	)	

WAIVER

Pursuant to the provisions of 18 U.S.C., Section 3552(d), I, the defendant in the above-styled cause, hereby WAIVE the requirement that the presentence investigation report prepared in my case be disclosed to me at least ten (10) days prior to sentencing. I understand the Court will read and review the presentence report even though it has not been disclosed to me at least ten (10) days before sentencing.

4/3/92	/s/ Gary C. Huckaby
DATE	DEFENDANT
4/3/92	/s/ L. Drew Redden
DATE	DEFENSE COUNSEL

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA

APPEARANCE BOND

UNITED STATES OF AMERICA

vs.

GARY CARLTON HUCKABY

CASE NUMBER
CR92-P-039-NE

(Filed
Feb. 21, 1992)

Non-surety: I, the undersigned defendant acknowledge that I and my personal representatives, jointly and severally, are bound to pay to the United States of America the sum of $500.00.

The conditions of this bond are that the defendant, GARY CARLTON HUCKABY, is to appear before this court and at such other places as the defendant may be required to appear, in accordance with any and all orders and directions relating to the defendant's appearance in this case, including appearance for violation of a condition of defendant's release as may be ordered or notified by this court or any other United States District Court to which the defendant may be held to answer or the cause transferred. The defendant is to abide by any judgment entered in such matter by surrendering to serve any sentence imposed and obeying any order or direction in connection with such judgment.

It is agreed and understood that this is a continuing bond (including any proceeding on appeal or review) which shall continue until such time as the undersigned are exonerated.

If the defendant appears as ordered or notified and otherwise obeys and performed the foregoing conditions of this bond, then this bond is to be void, but if the defendant fails to obey or perform any of these conditions, payment of the amount of this bond shall be due forthwith. Forfeiture of this bond for any breach of its conditions may be declared by any United States District Court having cognizance of the above entitled matter at the time of such breach and if the bond is forfeited and if the forfeiture is not set aside or remitted, judgment may be entered upon motion in such United States District Court against each debtor jointly and severally for the amount above stated, together with interest and costs, and execution may be issued any payment secured as provided by the Federal Rules of Criminal Procedure and any other laws of the United States.

This bond is signed on February 21, 1992 at Birmingham, Alabama.

/s/ Gary C. Huckaby
GARY CARLTON HUCKABY

701 Greene St.,
Huntsville, AL 35801
MAILING ADDRESS,
CITY, STATE,
ZIP & PHONE

Signed and acknowledged before me on February 21, 1992.

/s/ T. Michael Putnam
T. MICHAEL PUTNAM,
U.S. MAGISTRATE JUDGE

Approved: /s/ T. Michael Putnam
T. MICHAEL PUTNAM, U.S.
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

ACKNOWLEDGEMENT OF DEFENDANT

CASE NUMBER CR92-P-039-NE

I acknowledge that I am aware of the conditions of release set forth in the General Order Setting Conditions of Release dated September 10, 1990. I promise to obey all conditions of release, to appear as directed, and to surrender for service of any sentence imposed. I further acknowledge that I have received a copy of the General Order Setting Conditions of Release dated September 10, 1990.

FEBRUARY 23, 1992

/s/ Gary C. Huckaby
GARY CARLTON HUCKABY

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

TRIAL NOTICE

NAME OF DEFENDANT GARY CARLTON HUCKABY
CASE NUMBER CR92-P-039-NE

NOTICE TO DEFENDANT:

You are hereby notified that your case will be set for trial on a TRIAL DOCKET which commences on Monday, April 6, 1992 before UNITED STATES DISTRICT JUDGE SAM C. POINTER, JR.

You are directed to be present Monday, April 6, 1992 in Birmingham, Alabama at the aforesaid time ready for trial in Courtroom 8.

YOU WILL RECEIVE NO FURTHER NOTICE

NOTE: Judge Pointer will conduct a CONSENT DOCKET to receive plea changes on Friday, March 20, 1992.

NOTICE

IF THE INDICTMENT/INFORMATION CHARGES YOU WITH *ANY* OFFENSE THAT OCCURRED ON OR *AFTER* NOVEMBER 1, 1987, THE FOLLOWING SCHEDULE APPLIES TO YOUR CASE.

1. **All Rule 16 discovery requests must be filed by Thursday, February 27, 1992.**

2. **All other pretrial motions must be filed by Thursday, February 27, 1992. No motions**

filed after that date will be considered unless filed with leave of court.

3. Probation Office conferences will be conducted on Tuesday, February 25, 1992. You will receive further notice of the specific time for the conference in your case. Attendance at the conference is *MANDATORY.*

IF THE INDICTMENT/INFORMATION CHARGES YOU WITH *ONLY* OFFENSES THAT OCCURRED *BEFORE* NOVEMBER 1, 1987, THE FOLLOWING SCHEDULE APPLIES TO YOUR CASE:

Pretrial Conferences are to be held Friday, February 28, 1992. All pretrial motions *MUST BE FILED IN THE CLERK'S OFFICE* no later than Thursday, February 27, 1992. No motion filed after that time will be considered unless filed with the permission of the Court.

PERRY D. MATHIS, CLERK

BY: CHERYLE P. BROWNLEE,
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

UNITED STATES OF AMERICA	)	
v.	)	CASE NUMBER
	)	CR 92-P-039-NE
GARY CARLTON HUCKABY	)	

NOTICE OF ARRAIGNMENT

TAKE NOTICE that the above-entitled case has been set for **ARRAIGNMENT** at HUGO L. BLACK U.S. COURTHOUSE, 1729 5th Avenue North, Birmingham, Alabama, on **Thursday, February 20, 1992, at 9:30 a.m. before U.S. Magistrate T. Michael Putnam** to answer any charges against you as described in the attached indictment or information.

PERRY D. MATHIS, Clerk

By: /s/ Marthalene Brown
Deputy Clerk

DATE: February 11, 1992

Gary Carlton Huckaby
701 Green Street SW
Huntsville, AL 35801

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

UNITED STATES OF AMERICA

V. CR 92-P-039-NE

GARY CARLTON HUCKABY

INFORMATION

(Filed Feb. 11, 1992)

COUNT ONE: (26 USC 7203)
The United States Attorney charges:

That during the calendar year 1988, the Defendant,

GARY CARLTON HUCKABY

who was a resident of Huntsville, Alabama, had and received a gross income of $208,481.00; that by reason of such income he was required by law, following the close of the calendar year 1988 and on or before August 15, 1989, to make an income tax return to the District Director of Internal Revenue, at Birmingham, Alabama, or other proper officer of the United States, stating specifically the items of his gross income and any deductions and credits to which he was entitled; that well knowing all of the foregoing facts, he did wilfully and knowingly fail to make said income tax return to the said district Director of Internal Revenue, or to any other proper

officer of the United States, in violation of Title 26, United States Code, Section 7203.

FRANK W. DONALDSON
UNITED STATES ATTORNEY
/s/ Herbert H. Henry III
HERBERT H. HENRY III
ASSISTANT UNITED
STATES ATTORNEY

NOTICE: This opinion is subject to formal revision before publication in the advance sheets of *Southern Reporter.* Readers are requested to notify the Reporter of Decisions. Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((205) 242-4621), of any typographical or other errors, in order that corrections may be made before the opinion is printed in *Southern Reporter.*

SUPREME COURT OF ALABAMA

OCTOBER TERM, 1993-94

1921551

Gary Carlton Huckaby

v.

Alabama State Bar

(Alabama State Bar Disciplinary Commission, docket No. 92-07)

HOUSTON, JUSTICE.

Gary Carlton Huckaby appeals from an order of the Disciplinary Commission of the Alabama State Bar Association ("the Disciplinary Commission") suspending him from the practice of law. We reverse and remand.

Responding to Huckaby's conviction in a federal district court for violating 26 U.S.C. § 7203 (failure to file an income tax return, a misdemeanor), the general counsel of the Alabama State Bar Association ("the general counsel") formally charged Huckaby with misconduct and petitioned the Disciplinary Commission to suspend or disbar him, pursuant to Rule 22(a)(2), Alabama rules of

Disciplinary Procedure (Interim) (hereinafter all rule citations are to the Rules of Disciplinary Procedure). After rejecting Huckaby's request to refer the charge to one of the state bar's disciplinary boards for trial, the Disciplinary Commission conducted an evidentiary hearing; it later entered an order finding that Huckaby had committed a "serious crime," as defined in Rule 8, and suspending him from the practice of law for 45 days. Pursuant to Rule 26(g), that order was stayed pending this appeal.

The dispositive issue is whether the Disciplinary Commission acted within its authority in suspending Huckaby.

The Disciplinary Commission is composed of four members of the Board of Bar Commissioners of the Alabama State Bar Association; the members are not permitted to serve simultaneously on the Disciplinary Commission and on a disciplinary board. Rule 5(a). Rule 5(b) provides that the "[m]embers of the commission shall exercise the powers and perform the duties conferred and imposed upon them by [the Rules of Disciplinary Procedure] and by the rules of procedure adopted by the board of commissioners of the Alabama state bar."[1] Upon receiving a recommendation from the general counsel or from a local grievance committee, either of which

---

[1] Huckaby represents in his brief that "[i]nquiry prior to the hearing of this cause . . . resulted in a statement [from the general counsel] that no additional rules of procedure had been established by the Board of Bar Commissioners." The general counsel does not argue that this case is controlled by any rules of procedure that may have been adopted by the Board of Bar Commissioners.

has the authority to initiate a disciplinary investigation or proceeding, Rule 3(c), the Disciplinary Commission must decide, by a majority vote, whether an allegation or a complaint of misconduct on the part of a lawyer should be concluded by dismissal, by the imposition of a private or a public reprimand, or by the filing of a formal charge before one of five five-member disciplinary boards. Rule 12(c)(1). Each disciplinary board is composed of five members of the Board of Bar commissioners and each "exercise[s] the powers and perform[s] the duties conferred and imposed upon it by [the Rules of Disciplinary Procedure] and the rules of procedure adopted by the board of commissioners of the Alabama state bar, including the power and duty to consider and investigate any alleged ground for discipline or alleged disability of a lawyer called to its attention, or upon its own motion, to take such action with respect thereto as shall be appropriate to effectuate the purposes of [the] rules." Rule 4(b).

Although the Disciplinary Commission is vested with the customary powers of a factfinding tribunal (e.g., the power to administer oaths and affirmations and the power to compel by subpoenas the attendance of witnesses and the production of books, papers, and documents), Rule 17, its factfinding and disciplinary responsibilities do not extend to the trial of a formal charge filed by the general counsel, such as the one filed against Huckaby. The Disciplinary Commission has the authority to suspend a lawyer for not complying with the state bar's Client Security Fund Rules (Rule 9), Mandatory Continuing Legal Education Rules (Rule 10), and the bar's Rules Governing Interest on Lawyer Trust Accounts

(Rule 11). Rule 12(c)(2) authorizes the Disciplinary Commission to impose a public or a private reprimand on a lawyer found to be guilty of certain kinds of misconduct. Rule 20 authorizes the Disciplinary Commission to suspend a lawyer temporarily, pending imposition of final discipline. Likewise, Rule 21 authorizes the Disciplinary Commission to place a lawyer on temporary probation, and under Rule 24 the Disciplinary Commission may enter an order accepting and implementing a lawyer's conditional plea of guilt to a formal charge, provided that the General Counsel also approves the conditional plea. However, Rule 12 specifically states that "[a] disciplinary charge filed by the [general counsel] shall be tried to the disciplinary board by a formal hearing." The procedure for a formal hearing before one of the boards is set out in Rule 12(e).

Rule 22, the rule that formed the basis for the general counsel's charge against Huckaby, provides for the mandatory suspension or disbarment of a lawyer previously convicted in a court of law of a "serious crime." Rule 22(a)(2) states:

> "A lawyer must be disbarred or suspended:
>
> ". . . .
>
> "If the lawyer's conviction for a 'serious crime,' as defined in Rule 8 of these rules, has become final, regardless of the plea, in any court of record of this or any other state or of the United States or territory of the United States. The record of his or her conviction or a copy thereof certified and authenticated in the manner authorized by law is conclusive evidence of such conviction. When the conviction is not

> final, the general counsel may file a petition with the disciplinary commission, make a showing of good cause, and request the lawyer be suspended immediately, pursuant to Rule 20 of these rules, irrespective of such lawyer's right to appeal his or her conviction."

Rule 8(c)(2) defines a "serious crime" as follows:

> "(A) A felony;
>
> "(B) A lesser crime involving moral turpitude;
>
> "(C) A lesser crime, a necessary element of which, as determined by the statutory or common law definition of such crime, involves interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or
>
> "(D) An attempt, a conspiracy, or the solicitation of another to commit a 'serious crime.' "

Because Huckaby's conviction was final when the general counsel filed the formal charge of misconduct against him, the last sentence of Rule 22(a)(2), which would have authorized the Disciplinary Commission to temporarily suspend Huckaby pending a final determination of the charge, was not applicable. Therefore, the factual question of whether the crime to which Huckaby had pleaded guilty (i.e., failure to file an income tax return) constituted a "serious crime" within the meaning of Rule 8(c)(2) should have been submitted to a disciplinary board for final resolution. See, e.g., *Clark v. Alabama State Bar*, 547 So.2d 461 (Ala. 1989), wherein this Court held that the failure to pay income tax is not per se a crime involving moral turpitude. Not only is this the kind of factfinding

function that the disciplinary boards were intended to perform, but this separation of responsibility between the Disciplinary Commission and the disciplinary boards provides the constitutional underpinning for the disciplinary rules with respect to the handling of a formal charge filed against a lawyer. The right to practice law in this state is constitutionally protected as a valuable property right, and no lawyer can be deprived of that right except by due process of law and upon the presentation of clear and convincing evidence of misconduct. *Worley v. Alabama State Bar,* 572 So.2d 1239 (Ala. 1990); Rule 19. Because the Commission is charged with the responsibility of making an initial determination as to whether probable cause exists to file a formal charge against a lawyer, acting, in essence, as a "grand jury" in this respect, Rules 4(a) and 5(a) expressly prohibit any member of the Disciplinary Commission from serving on a disciplinary board. By trying the formal charge filed against Huckaby in this case, the Disciplinary Commission assumed the conflicting roles of both an accusatory tribunal and the ultimate determiner of guilt, violating both Rule 5 and Rule 12. As a result, Huckaby was forced to have the facts of his case determined by the same tribunal that had previously heard allegations against him and that had formed prosecutorial judgments concerning probable cause for a finding of guilt. This was not the procedure contemplated by the Rules of Disciplinary Procedure, and it was impermissible in this case.

For the foregoing reasons, we hold that the Disciplinary Commission lacked the authority under the Rules of Disciplinary Procedure to try the formal charge filed

against Huckaby. Therefore, the order suspending Huckaby from the practice of law for 45 days is reversed and the case is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Hornsby, C. J., and Maddox, Almon, Shores, Steagall, Ingram, and Cook, JJ., concur.

The Huntsville Times
Legal Classified

HUNTSVILLE ATTORNEY SUSPENDED

Huntsville attorney Gary C. Huckaby has been suspended from the practice of law for a period of 45 days by the Disciplinary Board of the Alabama State Bar. Mr. Huckaby's suspension became effective September 3, 1994. This action was a result of Mr. Huckaby having pled guilty in the United States District Court for the Northern District of Alabama to the criminal misdemeanor of failing to file an income tax return for the calendar year 1988.

Disciplinary Board

Alabama State Bar

September 8, 1994

The Huntsville Times

HUNTSVILLE LAWYER REPRIMANDED

Huntsville attorney, Barbara C. Miller, was publicly reprimanded by the Alabama State Bar on may 21, 1993, for her past failure to comply with certain rules relating to advertising by lawyers in the State of Alabama.

Disciplinary Commission
State of Alabama